

Presidential Documents

Executive Order 14103 of July 28, 2023

2023 Amendments to the Manual for Courts Martial, United States

By the authority vested in me as President by the Constitution and the laws of the United States of America, including chapter 47 of title 10, United States Code (Uniform Code of Military Justice, 10 U.S.C. 801–946a), and in order to prescribe additions and amendments to the Manual for Courts-Martial, United States, prescribed by Executive Order 12473 of April 13, 1984, as amended, it is hereby ordered as follows:

Section 1. Part II, Part III, Part IV, and Part V of the Manual for Courts-Martial, United States, are amended as described in Annex 1, which is attached to and made a part of this order. The amendments in Annex 1 shall take effect on the date of this order, subject to the following:

(a) Nothing in Annex 1 shall be construed to make punishable any act committed or omitted prior to the date of this order that was not punishable when committed or omitted.

(b) Nothing in Annex 1 shall be construed to invalidate any nonjudicial punishment proceeding, restraint, preliminary hearing, referral of charges, trial in which arraignment occurred, or other action begun prior to the date of this order, and any such nonjudicial punishment proceeding, restraint, preliminary hearing, referral of charges, trial in which arraignment occurred, or other action may proceed in the same manner and with the same effect as if the Annex 1 amendments had not been prescribed.

Sec. 2. Part I, Part II, Part III, Part IV, Part V, and Appendix 12A of the Manual for Courts-Martial, United States, are amended as described in Annex 2, which is attached to and made a part of this order. The amendments in Annex 2 shall apply in accordance with the effective date established by section 539C of the National Defense Authorization Act for Fiscal Year 2022 (NDAA FY 2022), Public Law 117–81, subject to the following:

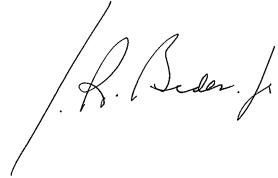
(a) Nothing in Annex 2 shall be construed to make punishable any act committed or omitted prior to the effective date established by section 539C of the NDAA FY 2022.

(b) Nothing in Annex 2 shall be construed to invalidate any nonjudicial punishment proceeding, restraint, preliminary hearing, referral of charges, trial in which arraignment occurred, or other action begun prior to the effective date established by section 539C of the NDAA FY 2022, and any such nonjudicial punishment proceeding, restraint, preliminary hearing, referral of charges, trial in which arraignment occurred, or other action may proceed in the same manner and with the same effect as if the Annex 2 amendments had not been prescribed.

Sec. 3. Appendix 12B, Appendix 12C, and Appendix 12D are added to the Manual for Courts-Martial, United States, and Part II of the Manual is amended as described in Annex 3, which is attached to and made a part of this order. The additions and amendments in Annex 3 shall take effect on December 27, 2023, and shall apply in accordance with section 539E(f) of the NDAA FY 2022 (10 U.S.C. 853 note), subject to the following:

(a) Nothing in Annex 3 shall be construed to make punishable any act committed or omitted prior to the effective date established by section 539E(f) of the NDAA FY 2022.

(b) Nothing in Annex 3 shall be construed to invalidate any nonjudicial punishment proceeding, restraint, preliminary hearing, referral of charges, trial in which arraignment occurred, or other action begun prior to the effective date established by section 539E(f) of the NDAA FY 2022, and any such nonjudicial punishment proceeding, restraint, preliminary hearing, referral of charges, trial in which arraignment occurred, or other action may proceed in the same manner and with the same effect as if the Annex 3 amendments had not been prescribed.



THE WHITE HOUSE,
July 28, 2023.

Billing code 3395-F3-P

ANNEX 1**Section 1. Part II of the Manual for Courts-Martial, United States, is amended as follows:****(a) R.C.M. 104 is amended to read as follows:****“Rule 104. Command influence****(a) *General prohibitions.*****(1) *Convening authorities and commanders.***

(A) No court-martial convening authority, nor any other commanding officer, may censure, reprimand, or admonish a court-martial or other military tribunal or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court-martial or tribunal, or with respect to any other exercise of the functions of the court-martial or tribunal or such persons in the conduct of the proceedings.

(B) No court-martial convening authority, nor any other commanding officer, may deter or attempt to deter a potential witness from participating in the investigatory process or testifying at a court-martial. The denial of a request to travel at government expense or refusal to make a witness available shall not by itself constitute unlawful command influence.

(2) *All persons subject to the UCMJ.* No person subject to the UCMJ may attempt to coerce or, by any unauthorized means, attempt to influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case or the action of any preliminary hearing officer or convening, approving, or reviewing authority with respect to such preliminary hearing officer's or authority's acts concerning the following: any decision to place a Servicemember into pretrial confinement; disposition decisions; rulings on pre-referral matters; findings at a preliminary hearing; convening a court-martial; decisions concerning plea agreements; selecting members; decisions concerning witness requests;

taking action on any clemency or deferment request; or any appellate or post-trial review of a case.

(3) *Scope.*

(A) *Instructions.* Paragraphs (a)(1) and (2) of this rule do not prohibit general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing personnel of a command in the substantive and procedural aspects of courts-martial.

(B) *Court-martial statements.* Paragraphs (a)(1) and (2) of this rule do not prohibit statements and instructions given in open session by the military judge or counsel.

(C) *Professional supervision.* Paragraphs (a)(1) and (2) of this rule do not prohibit action by the Judge Advocate General concerned under R.C.M. 109.

(D) *Offense.* Paragraphs (a)(1) and (2) of this rule do not prohibit appropriate action against a person for an offense committed while detailed as a military judge, counsel, or member of a court-martial, or while serving as individual counsel.

(E) *General statements regarding criminal activity or offenses.* Paragraphs (a)(1) and (2) of this rule do not prohibit statements regarding criminal activity or a particular criminal offense that do not advocate a particular disposition, do not advocate a particular court-martial finding or sentence, and do not relate to a particular accused.

(b) *Communication between superiors and subordinates.*

(1) A superior convening authority or officer may generally discuss matters to consider regarding the disposition of alleged violations of the UCMJ with a subordinate convening authority or officer, and a subordinate convening authority or officer may seek advice from a superior convening authority or officer regarding the disposition of an alleged offense under the UCMJ.

(2) No superior convening authority or officer may direct a subordinate convening authority or officer to make a particular disposition in a specific case or otherwise substitute the discretion of such authority or such officer for that of the subordinate convening authority or officer.

(c) *Prohibitions concerning evaluations.*

(1) *Evaluation of member or counsel.* In the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the armed forces, or in determining whether a member of the armed forces should be retained on active duty, no person subject to the UCMJ may:

(A) Consider or evaluate the performance of duty of any such person as a member of a court-martial; or

(B) Give a less favorable rating or evaluation of any defense counsel or special victims' counsel because of the zeal with which such counsel represented any client. As used in this rule, "special victims' counsel" are judge advocates and civilian counsel, who, in accordance with 10 U.S.C. § 1044e, are designated as Special Victims' Counsel.

(2) *Evaluation of military judge.*

(A) *General courts-martial.* Unless the general court-martial was convened by the President or the Secretary concerned, neither the convening authority nor any member of the convening authority's staff may prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge detailed to a general court-martial that relates to the performance of duty as a military judge.

(B) *Special courts-martial.* The convening authority may not prepare or review any report concerning the effectiveness, fitness, or efficiency of a military judge detailed to a special court-martial that relates to the performance of duty as a military judge. When the military judge is normally rated or the military judge's report is reviewed by the convening authority, the manner in which such military judge will be rated or evaluated upon the performance of duty as a military judge may be as prescribed in regulations of the Secretary concerned, which shall ensure the absence of any command influence in the rating or evaluation of the military judge's judicial performance.

(d) *Command discretion.*

(1) A superior convening authority or commanding officer may withhold the authority of a subordinate convening authority or officer to dispose of offenses in individual cases, types of cases, or generally.

(2) Except as provided in paragraph (d)(1) of this rule or as otherwise authorized under the UCMJ, a superior convening authority or commanding officer may not limit the discretion of a subordinate convening authority or officer to act with respect to a case for which the subordinate convening authority or officer has the authority to dispose of the offenses."

(b) R.C.M. 201(e) is amended to read as follows:

"(e) *Reciprocal jurisdiction.*

(1) Each armed force has court-martial jurisdiction over all persons subject to the UCMJ.

(2)(A) A commander of a unified or specified combatant command may convene courts-martial over members of any of the armed forces.

(B) So much of the authority vested in the President under Article 22(a)(9), to empower any commanding officer of a joint command or joint task force to convene courts-martial is

delegated to the Secretary of Defense, and such a commanding officer may convene general courts-martial for the trial of members of any of the armed forces assigned or attached to a combatant command or joint command.

(C) A commander who is empowered to convene a court-martial under subparagraphs (e)(2)(A) or (e)(2)(B) of this rule may expressly authorize a commanding officer of a subordinate joint command or subordinate joint task force who is authorized to convene special and summary courts-martial to convene such courts-martial for the trial of members of other armed forces assigned or attached to a joint command or joint task force, under regulations that the superior command may prescribe.

(3)(A) An accused should not ordinarily be tried by a court-martial convened by a member of a different armed force except when the circumstances described in subparagraphs (e)(2)(A) or (B) of this rule exist. However, failure to comply with this non-binding policy does not affect an otherwise valid referral.

(B) The non-binding policy stated by subparagraph (e)(3)(A) of this rule does not apply when one or more of the following circumstances exists:

- (i) The court-martial is convened by a commander authorized to convene courts-martial under paragraph (e)(2) of this rule;
- (ii) The accused cannot be delivered to the armed force of which the accused is a member without manifest injury to the armed forces;
- (iii) The court-martial is convened by a member of the Space Force to try a member of the Air Force; or
- (iv) The court-martial is convened by a member of the Air Force to try a member of the Space Force.

(4) Nothing in this rule prohibits detailing to a court-martial a military judge, member, or counsel who is a member of an armed force different from that of the accused, the convening authority, or both.

(5) When a member of one armed force is tried by a court-martial convened by a member of another armed force, the court-martial will use the implementing regulations and procedures prescribed by the Secretary concerned of the military service of the accused. In all cases, departmental review after that by the officer with authority to convene a general court-martial for the command that held the trial, where that review is required by the UCMJ, shall be carried out by the department that includes the armed force of which the accused is a member.

(6) Unless otherwise directed by the President or Secretary of Defense, whenever action under this Manual is required or authorized to be taken by a person superior to—

(A) a commander of a unified or specified combatant command; or
(B) a commander of any other joint command or joint task force that is not part of a unified or specified combatant command,
the matter shall be referred to the Secretary of the armed force of which the accused is a member. The Secretary may convene a court-martial, take other appropriate action, or, subject to R.C.M. 504(c), refer the matter to any person authorized to convene a court-martial of the accused.

(7) When there is a disagreement between the Secretaries of two military departments or between the Secretary of a military department and the commander of a unified or specified combatant command or other joint command or joint task force as to which organization should exercise jurisdiction over a particular case or class of cases, the Secretary of Defense or an official acting under the authority of the Secretary of Defense shall designate which organization will exercise jurisdiction.”

(c) R.C.M. 305(j) is amended to read as follows:

“(j) *Review by military judge.* Once the charges for which the accused has been confined are referred to trial, or in a pre-referral proceeding conducted in accordance with R.C.M. 309, the military judge shall review the propriety of pretrial confinement upon motion for appropriate relief.

(1) *Release.* The military judge shall order release from pretrial confinement only if:

(A) The 7-day reviewing officer’s decision was an abuse of discretion, and there is not sufficient information presented to the military judge justifying continuation of pretrial confinement under subparagraph (h)(2)(B) of this rule;

(B) Information not presented to the 7-day reviewing officer establishes that the confinee should be released under subparagraph (h)(2)(B) of this rule; or

(C) The provisions of paragraph (i)(1) or (2) of this rule have not been complied with and information presented to the military judge does not establish sufficient grounds for continued confinement under subparagraph (h)(2)(B) of this rule.

(2) *Credit.* Upon sentencing, the military judge shall order administrative credit under subsection (k) of this rule for any pretrial confinement served as a result of an abuse of discretion or failure to comply with the provisions of subsections (f), (h), or (i) of this rule.”

(d) R.C.M. 307(b) is amended to read as follows:

“(b) *How charges are preferred; oath.* In preferring charges and specifications —

(1) The person preferring the charges and specifications must sign them under oath before a commissioned officer of the armed forces authorized to administer oaths; and

(2) The writing under paragraph (b)(1) must state that—

(A) the signer has personal knowledge of, or has investigated, the matters set forth in the

charges and specifications; and

(B) the matters set forth in the charges and specifications are true to the best of the knowledge and belief of the signer.

(3) Any procedure, including those by remote means, which appeals to the conscience of the person to whom the oath is administered and which binds that person to properly perform that person's duties under this rule, is sufficient."

(e) R.C.M. 309 is amended to read as follows:

"Rule 309. Proceedings conducted before referral

(a) In general.

(1) A military judge detailed under regulations of the Secretary concerned may conduct proceedings under Article 30a, before referral of charges and specifications to court-martial for trial, and may issue such rulings and orders as necessary to further the purpose of the proceedings. A military judge may issue such orders and rulings only when the matters would be subject to consideration by a military judge in a general or special court-martial.

(2) The matters that may be considered and ruled upon by a military judge in proceeding under this rule are limited to those matters specified in subsection (b) of this rule.

(3) If any matter in a proceeding under this rule becomes a subject at issue with respect to charges that have been referred to a general or special court-martial, the matter, to include any motions, related papers, and the record of the hearing, if any, shall be provided to the military judge detailed to the court-martial.

(b) Pre-referral matters.

(1) *Pre-referral investigative subpoenas.* A military judge may, upon application by the Government, consider whether to issue a pre-referral investigative subpoena under R.C.M.

703(g)(3)(C). The proceeding may be conducted *ex parte* and may be conducted *in camera*.

(2) *Pre-referral warrants or orders for wire or electronic communications.* A military judge may, upon written application by a federal law enforcement officer or authorized counsel for the Government in connection with an ongoing investigation of an offense or offenses under the UCMJ, consider whether to issue a warrant or order for wire or electronic communications and related information as provided under R.C.M. 703A. The proceeding may be conducted *ex parte* and may be conducted *in camera*.

(3) *Requests for relief from subpoena or other process.* A person in receipt of a pre-referral investigative subpoena under R.C.M. 703(g)(3)(C), a victim named in a specification whose personal and confidential information has been subpoenaed under R.C.M. 703(g)(3)(C)(ii), or a service provider in receipt of a warrant or court order to disclose information about wire or electronic communications under R.C.M. 703A may request relief on grounds that compliance with the subpoena, warrant, or order is unreasonable, oppressive or prohibited by law. The military judge shall review the request and shall either order the person or service provider to comply with the subpoena, warrant, or order, or modify or quash the subpoena, warrant, or order as appropriate. In a proceeding under this paragraph, the United States shall be represented by an authorized counsel for the Government.

(4) *Pre-referral matters referred by an appellate court.* When a Court of Criminal Appeals or the Court of Appeals for the Armed Forces, in the course of exercising the jurisdiction of such court, remands the case for a pre-referral judicial proceeding, a military judge may conduct such a proceeding under this rule. This includes matters referred by a Court of Criminal Appeals under subsection (e) of Article 6b.

(5) *Pre-referral matters under subsection (c) of Article 6b.* The military judge may

designate a suitable person to assume the rights of a victim who is under 18 years of age (but who is not a member of the armed forces), or who is incompetent, incapacitated, or deceased. Upon appointment by the military judge, the legal guardian of the victim, the representative of the victim's estate, a family member, or any other person designated as suitable by the military judge, may assume the rights of the victim. Under no circumstances may the military judge designate the accused to assume the rights of the victim.

(6) *Pretrial confinement of an accused.* After action by the 7-day reviewing officer under R.C.M. 305(i)(2)(C), a military judge may, upon application of an accused for appropriate relief, review the propriety of pretrial confinement. A military judge may order release from pretrial confinement under the provisions of R.C.M. 305(j)(1).

(7) *The mental capacity or mental responsibility of an accused.*

(A) A military judge may, under the provisions of R.C.M. 706(b)(1), order an inquiry into the mental capacity or mental responsibility of an accused before referral of charges. The proceeding may be conducted *ex parte* and may be conducted *in camera*.

(B) A military judge may, under the provisions of R.C.M. 909, conduct a hearing to determine the mental capacity of the accused.

(8) *A request for individual military counsel.* When an accused requests individual military counsel prior to charges being referred to a general or special court-martial, a military judge may review the request subject to the provisions of R.C.M. 506(b).

(9) *Victim's petition for relief.*

(A) A victim of an offense under the UCMJ, as defined in Article 6b(b), may file a motion pre-referral requesting that a military judge require a preliminary hearing officer conducting a preliminary hearing under R.C.M. 405 to comply with:

- (i) Articles 6b or 32;
- (ii) R.C.M. 405; or
- (iii) Mil. R. Evid. 412, 513, 514, or 615.

(B) The military judge may grant or deny such a motion. The ruling is subject to further review pursuant to Article 6b(e).

(c) *Procedure for submissions.* The Secretary concerned shall prescribe the procedures for receiving requests for proceedings under this rule and for detailing military judges to such proceedings.

(d) *Hearings.* Any hearing conducted under this rule shall be conducted in accordance with the procedures generally applicable to sessions conducted under Article 39(a), and R.C.M. 803.

(e) *Record.* A separate record of any proceeding under this rule shall be prepared and forwarded to the convening authority or commander with authority to dispose of the charges or offenses in the case. If charges are referred to trial in the case, such record shall be included in the record of trial.

(f) *Military magistrate.* If authorized under regulations of the Secretary concerned, a military judge detailed to a proceeding under this rule, other than a proceeding under paragraph (b)(2), (b)(7)(B), or (b)(8) of this rule, may designate a military magistrate to preside and exercise the authority of the military judge over the proceeding.”

(f) R.C.M. 405(f) is amended to read as follows:

“(f) *Rights of the accused.* At any preliminary hearing under this rule, the accused shall have the right to:

- (1) Be advised of the charges under consideration;
- (2) Be represented by counsel;

- (3) Be informed of the purpose of the preliminary hearing;
- (4) Be informed of the right against self-incrimination under Article 31;
- (5) In accordance with the terms of R.C.M. 405(j)(4), be present throughout the preliminary hearing;
- (6) Cross-examine witnesses on matters relevant to the issues for determination under subsection (a) of this rule;
- (7) Present matters relevant to the issues for determination under subsection (a); and
- (8) Make a sworn or unsworn statement relevant to the issues for determination under subsection (a)."

(g) R.C.M. 405(h)(3)(B)(iii) is amended to read as follows:

“(iii) If the Government objects to production of the evidence, defense counsel may request that the preliminary hearing officer determine whether the evidence should be produced. If the preliminary hearing officer determines that the evidence is relevant, not cumulative, and necessary to a determination of the issues under subsection (a) of this rule and that the issuance of a pre-referral investigative subpoena would not cause undue delay to the preliminary hearing, the preliminary hearing officer shall direct counsel for the Government to seek a pre-referral investigative subpoena for the defense-requested evidence from a military judge in accordance with R.C.M. 309 or authorization from the general court-martial convening authority to issue an investigative subpoena. If counsel for the Government refuses or is unable to obtain an investigative subpoena, the counsel shall set forth the reasons why the investigative subpoena was not obtained in a written statement that shall be included in the preliminary hearing report under subsection (l) of this rule.”

(h) R.C.M. 405(i)(2)(A) is amended to read as follows:

“(A) *Inadmissibility of certain evidence.* In a case of an alleged sexual offense, as defined under Mil. R. Evid. 412(d), evidence offered to prove that the alleged victim engaged in other sexual behavior or evidence offered to prove any alleged victim’s sexual predisposition is not admissible at a preliminary hearing unless—

(i) the evidence would be admissible at trial under Mil. R. Evid. 412(b)(1) or (2);

and

(ii) the evidence is not cumulative and is necessary to a determination of the issues under subsection (a) of this rule.”

(i) R.C.M. 405(j)(3) is amended to read as follows:

“(3) *Access by spectators.* Preliminary hearings are public proceedings and should remain open to the public whenever possible, whether conducted in person or via remote means. If there is an overriding interest that outweighs the value of an open preliminary hearing, the convening authority or the preliminary hearing officer may restrict or foreclose access by spectators to all or part of the proceedings. Any restriction or closure must be narrowly tailored to protect the overriding interest involved. Before ordering any restriction or closure, a convening authority or preliminary hearing officer must determine whether any reasonable alternatives to such restriction or closure exist, or if some lesser means can be used to protect the overriding interest in the case. The convening authority or preliminary hearing officer shall make specific findings of fact in writing that support the restriction or closure. The written findings of fact shall be included in the preliminary hearing report.”

(j) R.C.M. 405(j)(4) is amended to read as follows:

“(4) *Presence of accused.* The accused shall be present for the preliminary hearing.

(A) *Remote presence of the accused.* The convening authority that directed the

preliminary hearing may authorize the use of audio-visual technology between the parties and the preliminary hearing officer. In such circumstances the “presence” requirement of the accused is met only when the accused has a defense counsel physically present at the accused’s location or when the accused consents to presence by remote means with the opportunity for confidential consultation with defense counsel during the proceeding. Such technology may include two or more remote sites as long as all parties can see and hear each other.

(B) The accused shall be considered to have waived the right to be present at the preliminary hearing if the accused:

- (i) After being notified of the time and place of the proceeding is voluntarily absent; or
- (ii) After being warned by the preliminary hearing officer that disruptive conduct will cause removal from the proceeding, persists in conduct that is such as to justify exclusion from the proceeding.”

(k) A new R.C.M. 406(c) is inserted immediately after R.C.M. 406(b) to read as follows:

“(c) *Distribution.* A copy of the advice of the staff judge advocate shall be provided to the defense if charges are referred to trial by general court-martial.”

(l) R.C.M. 703(d) is amended to read as follows:

“(d) *Employment of expert witnesses and consultants.*

(1) *Experts for the prosecution.* When the employment of a prosecution expert witness or consultant is considered necessary, counsel for the Government shall, in advance of employment of the expert, and with notice to the defense, submit a request for funding of the expert in accordance with regulations prescribed by the Secretary concerned.

(2) *Experts for the defense.* When the employment of a defense expert witness or

consultant is considered necessary, the defense shall submit a request for funding of the expert in accordance with regulations prescribed by the Secretary concerned.

(A) After referral of charges, a denied defense request for an expert witness or consultant may be raised before the military judge. Motions for expert consultants may be raised *ex parte*. The military judge shall determine—

- (i) in the case of an expert witness, whether the testimony is relevant and necessary; and
- (ii) in the case of an expert consultant, whether the assistance is necessary for an adequate defense.

(B) If the military judge grants a motion for employment of a defense expert witness or consultant, the expert witness or consultant, or an adequate substitute, shall be provided in accordance with regulations prescribed by the Secretary concerned. In the absence of advance approval by an official authorized to grant such approval under the regulations prescribed by the Secretary concerned, expert witnesses and consultants may not be paid fees other than those to which they are entitled under subparagraph (g)(3)(E) of this rule.”

(m) R.C.M. 703(g)(3)(G) is amended to read as follows:

“(G) *Relief*. If either a person subpoenaed or a victim named in a specification whose personal and confidential information has been subpoenaed under subparagraph (g)(3)(C)(ii) of this rule requests relief on grounds that compliance is unreasonable, oppressive, or prohibited by law, the military judge or, if before referral, a military judge detailed under Article 30a, shall review the request and shall—

- (i) order that the subpoena be modified or quashed, as appropriate; or
- (ii) order the person to comply with the subpoena.”

(n) R.C.M. 703(g)(3)(H)(iii) is amended to read as follows:

“(iii) *Form.* A warrant of attachment shall be written. All documents in support of the warrant of attachment shall be attached to the warrant, together with any charge sheets and convening orders, if applicable.”

(o) R.C.M. 703A is amended to read as follows:**“Rule 703A. Warrant or order for wire or electronic communications**

(a) *In general.* A military judge detailed in accordance with Article 26 or Article 30a, may, upon written application by a federal law enforcement officer, trial counsel, or other authorized counsel for the Government in connection with an ongoing investigation of an offense or offenses under the UCMJ, issue one or more of the following:

(1) A warrant for the disclosure by a provider of electronic communication service of the contents of any wire or electronic communication.

(2) A warrant for the disclosure by a provider of remote computing service of the contents of any wire or electronic communication that is held or maintained on that service—

(A) on behalf of, and received by means of electronic transmission from (or created by means of computer processing of communications received by means of electronic transmission from), a subscriber or customer of such remote computing service; and

(B) solely for the purpose of providing storage or computer processing services to such subscriber or customer, if the provider is not authorized to access the contents of any such communications for purposes of providing any services other than storage or computer processing.

(3) A warrant or order for the disclosure by a provider of electronic communication service or remote computing service of a record or other information pertaining to a subscriber to

or customer of such service (not including the contents of communications).

(b) *Warrant procedures.*

(1) *Probable cause required.* A military judge shall issue a warrant authorizing the search for and seizure of information specified in subsection (a) of this rule if—

(A) The federal law enforcement officer, trial counsel, or other authorized counsel for the Government applying for the warrant presents an affidavit or sworn testimony, subject to examination by the military judge, in support of the application; and

(B) Based on the affidavit or sworn testimony, the military judge determines that there is probable cause to believe that the information sought contains evidence of a crime.

(2) *Issuing the warrant.* The military judge shall issue the warrant to the federal law enforcement officer, trial counsel, or other authorized counsel for the Government who applied for the warrant.

(3) *Contents of the warrant.* The warrant shall identify the property to be searched, identify any property or other information to be seized, and designate the military judge to whom the warrant must be returned.

(4) *Executing the warrant.* The presence of the federal law enforcement officer, trial counsel, or other authorized counsel for the Government identified in the warrant shall not be required for service or execution of a search warrant issued in accordance with this rule requiring disclosure by a provider of electronic communications service or remote computing service of the contents of communications or records or other information pertaining to a subscriber to or customer of such service.

(5) *Quashing or modifying the warrant.* A military judge issuing a warrant under subsection (a), on a motion made promptly by the service provider, may quash or modify such

warrant, if the warrant is determined to be unreasonable or oppressive or prohibited by law.

(c) Order procedures.

(1) A military judge shall issue an order authorizing the disclosure of information specified in paragraph (a)(3) of this rule if the federal law enforcement officer, trial counsel, or other authorized counsel for the Government applying for the order offers specific and articulable facts showing that there are reasonable grounds to believe that the records or other information sought are relevant and material to an ongoing criminal investigation.

(2) *Quashing or modifying order.* A military judge issuing an order under paragraph (c)(1) of this rule, on a motion made promptly by the service provider, may quash or modify such order if the order is determined to be unreasonable, oppressive, or prohibited by law.

(d) Non-disclosure orders.

(1) A federal law enforcement officer, trial counsel, or other authorized counsel for the Government acting under this rule may apply to a military judge for an order commanding a provider of electronic communications service or remote computing service to whom a warrant or order under this rule is directed, for such period as the military judge deems appropriate, not to notify any other person of the existence of the warrant or order. The military judge shall issue the order if the military judge determines that there is reason to believe that notification of the existence of the warrant or order will result in an adverse result described in paragraph (d)(2) of this rule.

(2) An adverse result for the purposes of paragraph (d)(1) of this rule is—

- (A) endangering the life or physical safety of an individual;
- (B) flight from prosecution;
- (C) destruction of or tampering with evidence;

- (D) intimidation of potential witnesses; or
- (E) otherwise seriously jeopardizing an investigation or unduly delaying a trial.

(e) *No cause of action against a provider disclosing information under this rule.* As provided under 18 U.S.C. § 2703(e), no cause of action shall lie in any court against any provider of wire or electronic communication service, its officers, employees, agents, or other specified persons for providing information, facilities, or assistance in accordance with the terms of a warrant or order under this rule.

(f) *Requirement to preserve evidence.* To the same extent as provided in 18 U.S.C. § 2703(f)—

- (1) A provider of wire or electronic communication services or a remote computing service, upon the request of a federal law enforcement officer, trial counsel, or other authorized counsel for the Government, shall take all necessary steps to preserve records and other evidence in its possession pending the issuance of an order or other process; and
- (2) Shall retain such records and other evidence for a period of 90 days, which shall be extended for an additional 90-day period upon a renewed request by the governmental entity.

(g) *Definition.* As used in this rule, the term “federal law enforcement officer” includes an employee of the Army Criminal Investigation Command, the Naval Criminal Investigative Service, the Air Force Office of Special Investigations, or the Coast Guard Investigative Service who has authority to request a search warrant.”

(p) R.C.M. 705(d)(1) is amended to read as follows:

“(1) *In general.* Subject to such limitations as the Secretary concerned may prescribe pursuant to R.C.M. 705(a), a plea agreement that limits the sentence that can be imposed by the court-martial for one or more charges and specifications may contain:

- (A) a limitation on the maximum punishment that can be imposed by the court-

martial;

(B) a limitation on the minimum punishment that can be imposed by the court-martial;

(C) limitations on the maximum and minimum punishments that can be imposed by the court-martial; or,

(D) a specified sentence or portion of a sentence that shall be imposed by the court-martial.”

(q) R.C.M. 706(b)(1) is amended to read as follows:

“(1) *Before referral.* Before referral of charges, an inquiry into the mental capacity or mental responsibility of the accused may be ordered by the convening authority before whom the charges are pending for disposition, or by a military judge or magistrate in a proceeding conducted in accordance with R.C.M. 309.”

(r) R.C.M. 706(c)(3)(A) is amended to read as follows:

“(A) That upon completion of the board’s investigation, a statement consisting only of the board’s ultimate conclusions as to all questions specified in the order shall be submitted to the officer ordering the examination, the accused’s commanding officer, the preliminary hearing officer, if any, appointed pursuant to Article 32, and to all government and defense counsel in the case, the convening authority, and, after referral, to the military judge.”

(s) R.C.M. 707(c)(1) is amended to read as follows:

“(1) *Procedure.* Prior to referral, all requests for pretrial delay, together with supporting reasons, will be submitted to the convening authority for resolution. After referral, such requests for pretrial delay will be submitted to the military judge for resolution.”

(t) R.C.M. 707(e) is amended to read as follows:

“(e) *Waiver*. Except as provided in R.C.M. 910(a)(2), a plea of guilty that results in a finding of guilty waives any speedy trial issue under this rule as to that offense.”

(u) R.C.M. 804(b) is amended to read as follows:

“(b) *Presence by remote means*.

(1) The military judge may order the use of audiovisual technology, such as video teleconferencing technology, between the parties and the military judge for purposes of Article 39(a) sessions, subject to the limitations in paragraph (2) of this rule. Use of such audiovisual technology will satisfy the “presence” requirement of the accused only when the accused has a defense counsel physically present at the accused’s location or when the accused consents to presence by remote means with the opportunity for confidential consultation with defense counsel during the proceeding. Such technology may include two or more remote sites as long as all parties can see and hear each other.

(2) The use of audiovisual technology between the parties and the military judge may be used for a plea inquiry under R.C.M. 910(d), (e), and (f) and for presentencing proceedings before a military judge under R.C.M. 1001, only when there are exceptional circumstances that interfere with the normal administration of military justice, as determined by the military judge, and with the consent of the accused. Defense counsel must be physically present at the accused’s location during an inquiry prior to the acceptance of a plea under R.C.M. 910(d), (e), and (f) and during presentencing proceedings before a military judge under R.C.M. 1001.”

(v) R.C.M. 813(a) through (d) are amended to read as follows:

“(a) *Opening sessions*. Except as noted in subsection (d), when the court-martial is called to order for the first time in a case, the military judge shall ensure that the following is announced:

(1) The order, including any amendment, by which the court is convened;

- (2) The name, rank, and unit or address of the accused;
- (3) The name and rank of the military judge presiding;
- (4) The names and ranks of the members, if any, who are present;
- (5) The names and ranks of members who are absent, if presence of members is required
- (6) The names and ranks (if any) of counsel who are present;
- (7) The names and ranks (if any) of counsel who are absent; and
- (8) The name and rank (if any) of any detailed court reporter.

(b) *Later proceedings.* When the court-martial is called to order after a recess or adjournment or after it has been closed for any reason, the military judge shall ensure that the record reflects whether all parties and members who were present at the time of the adjournment or recess, or at the time the court-martial closed, are present.

(c) *Additions, replacement, and absences of personnel.* Whenever there is a replacement of the military judge, any member, or counsel, either through the appearance of new personnel or personnel previously absent or through the absence of personnel previously present, the military judge shall ensure the record reflects the change and the reason for it.

(d) Under R.C.M. 813(a)(1), the name, grade, and position of the convening authority, with the exception of the Secretary concerned, the Secretary of Defense, or the President, shall be omitted from announcement during the opening session of the court-martial.”

(w) R.C.M. 909(c) is amended to read as follows:

“(c) *Determination before referral.*

(1) If an inquiry pursuant to R.C.M. 706 conducted before referral concludes that an accused is suffering from a mental disease or defect that renders the accused mentally incompetent to stand trial, the convening authority before whom the charges are pending for

disposition may disagree with the conclusion and take any action authorized under R.C.M. 401, including referral of the charges to trial. If that convening authority concurs with the conclusion, the convening authority shall forward the charges to the general court-martial convening authority. If, upon receipt of the charges, the general court-martial convening authority similarly concurs, then he or she shall commit the accused to the custody of the Attorney General. If the general court-martial convening authority does not concur, that authority may take any action that the authority deems appropriate in accordance with R.C.M. 407, including referral of the charges to trial.

(2) Upon request of the Government or the accused, a military judge may conduct a hearing to determine the mental capacity of the accused in accordance with R.C.M. 309 and subsection (e) of this rule at any time prior to referral.”

(x) A new R.C.M. 910(f)(8) is inserted immediately after R.C.M. 910(f)(7) to read as follows:

“(8) *Basis for rejecting a plea agreement.* The military judge of a general or special court-martial shall reject a plea agreement that—

- (A) contains a provision that has not been accepted by both parties;
- (B) contains a provision that is not understood by the accused;
- (C) except as provided in Article 53a(c), contains a provision for a sentence that is less than the mandatory minimum sentence applicable to an offense referred to in Article 56(b)(2);
- (D) is prohibited by law; or
- (E) is contrary to, or is inconsistent with, these rules with respect to the terms, conditions, or other aspects of plea agreements.”

(y) R.C.M. 910(j) is amended to read as follows:

“(j) *Waiver*. Except as provided in paragraph (a)(2) of this rule, a plea of guilty that results in a finding of guilty waives any objection, whether or not previously raised, as to the factual issue of guilt of the offense(s) to which the plea was made and any non-jurisdictional defect as to the offense(s) to which the plea was made that occurred prior to the plea.”

(z) R.C.M. 912A(a)(4)(A) is amended to read as follows:

“(A) If the convening authority authorizes the military judge to impanel a specific number of alternate members, the number of members impaneled shall be the number of members required under paragraphs (1), (2), or (3) of this subsection, as applicable, plus the number of alternate members specified by the convening authority. The military judge shall not impanel the court-martial until the specified number of alternate members has been identified. New members may be detailed in order to impanel the specified number of alternate members.”

(aa) A new R.C.M. 912A(d)(3)(C) is inserted immediately after R.C.M. 912A(d)(3)(B) to read as follows:

“(C) In a case in which the accused has elected to be tried by a panel consisting of at least one-third enlisted members under R.C.M. 503(a)(2), the convening authority may instruct the military judge to prioritize impaneling a specific number of alternate enlisted members before impaneling alternate officer members. These members shall be identified in numerical order beginning with the lowest remaining random number assigned pursuant to R.C.M. 912(f)(5), after first identifying members under paragraph (1) of this subsection.”

(bb) R.C.M. 914(e) is amended to read as follows:

“(e) *Remedy for failure to produce statement*.

(1) *Party refusal to comply*. If the other party elects not to comply with an order to deliver a statement to the moving party, the military judge shall order that the testimony of the witness

be disregarded by the trier of fact and that the trial proceed, or, if it is the trial counsel who elects not to comply, shall declare a mistrial if required in the interest of justice.

(2) *Exception.* In the event that the other party cannot comply with this rule because the statement is lost, and can prove, by a preponderance of evidence, that the loss of the witness statement was not attributable to bad faith or gross negligence, the military judge may exercise the sanctions set forth in paragraph (e)(1) of this rule only if—

(A) the statement is of such central importance to an issue that it is essential to a fair trial, and

(B) there is no adequate substitute for the statement.”

(cc) R.C.M. 916(e)(2) is amended to read as follows:

“(2) *Certain aggravated offer-type assault cases.* It is a defense to aggravated assault that the accused:

(A) Apprehended, on reasonable grounds, that bodily harm was about to be inflicted wrongfully on the accused; and

(B) In order to deter the assailant, offered but did not actually inflict or attempt to inflict substantial or grievous bodily harm.”

(dd) A new R.C.M. 920(g) is inserted immediately after R.C.M. 920(f) to read as follows:

“(g) *Waiver.* Instructions on a lesser included offense shall not be given when both parties waive such an instruction. After receiving applicable notification of those lesser included offenses of which an accused may be convicted, the parties may waive the reading of a lesser included offense instruction. A written waiver is not required. The accused must affirmatively acknowledge that the accused understands the rights involved and affirmatively waive the instruction on the record. The accused’s waiver must be made freely, knowingly, and

intelligently. In the case of a joint or common trial, instructions on a lesser included offense shall not be given as to an individual accused when that accused and the Government agree to waive such an instruction.”

(ee) R.C.M. 1003(b)(2) is amended to read as follows:

“(2) *Forfeiture of pay and allowances.* Unless a total forfeiture is adjudged, a sentence to forfeiture shall state the exact amount in whole dollars to be forfeited each month and the number of months the forfeitures will last. Allowances shall be subject to forfeiture only when the sentence includes forfeiture of all pay and allowances. The maximum authorized amount of a partial forfeiture shall be determined by using the basic pay, retired pay, or retainer pay, as applicable, or, in the case of reserve component personnel on inactive duty, compensation for periods of inactive-duty training, authorized by the cumulative years of service of the accused, and, if no confinement is adjudged, any sea or hardship duty pay. If the sentence also includes reduction in grade, expressly or by operation of law, the maximum forfeiture shall be based on the grade to which the accused is reduced. Forfeitures of greater than two-thirds’ pay per month may be imposed only during periods of confinement.”

(ff) R.C.M. 1003(c)(2) is amended to read as follows:

“(2) *Based on grade of accused.*

(A) *Commissioned or warrant officers, cadets, and midshipmen.*

(i) A commissioned or warrant officer or a cadet or midshipman may not be reduced in grade by any court-martial. However, in time of war or national emergency, the Secretary concerned, or such Under Secretary or Assistant Secretary as may be designated by the Secretary concerned, may commute a sentence of dismissal to reduction to any enlisted grade.

(ii) A commissioned or warrant officer or a cadet or midshipman may not

be sentenced to hard labor without confinement.

(iii) Only a general court-martial, upon conviction of any offense in violation of the UCMJ, may sentence a commissioned or warrant officer or a cadet or midshipman to be separated from the service with a punitive separation. In the case of commissioned officers, cadets, midshipmen, and commissioned warrant officers, the separation shall be by dismissal. In the case of all other warrant officers, the separation shall be by dishonorable discharge.

(B) *Enlisted persons.* See paragraph (b)(9) of this rule and R.C.M. 1301(d)."

(gg) A new R.C.M. 1101(e) is inserted immediately after R.C.M. 1101(d) to read as follows:

"(e) *Modification.* The Statement of Trial Results may be modified as follows:

(1) The military judge may modify the Statement of Trial Results to correct any errors prior to certification of the record of trial under R.C.M. 1112.

(2) The Court of Criminal Appeals, the Court of Appeals for the Armed Forces, and the Judge Advocate General or the Judge Advocate General's designee may modify the Statement of Trial Results in the performance of their duties and responsibilities.

(3) If a case is remanded to a military judge, the military judge may modify the Statement of Trial Results consistent with the purposes of the remand.

(4) Any modification to the Statement of Trial Results must be included in the record of trial."

(hh) R.C.M. 1102(b)(1) is amended to read as follows:

"(1) *Forfeiture.* Unless deferred under R.C.M. 1103 or suspended under R.C.M. 1107, that part of an adjudged sentence that includes forfeitures is executed and takes effect as follows:

(A) *Generally.* Subject to subparagraph (B), if a sentence includes forfeitures in

pay or allowances, or, if forfeiture is required by Article 58b, that part of the sentence shall take effect on the earlier of—

- (i) 14 days after the sentence is announced under R.C.M. 1007; or
- (ii) in the case of a summary court-martial, the date on which the sentence is approved by the convening authority.

(B) *Accused Not in Confinement.* If an accused is not confined and is performing military duties, that portion of the sentence that provides for forfeiture of more than two-thirds' pay per month shall not be executed."

(ii) A new R.C.M. 1102(b)(6) is inserted immediately after R.C.M. 1102(b)(5) to read as follows:

“(6) *Reduction in Enlisted Grade.*

(A) *Adjudged Reduction.* Unless deferred under R.C.M. 1103 or suspended under R.C.M. 1107, that part of an adjudged sentence that includes reduction in enlisted grade shall take effect on the earlier of—

- (i) 14 days after the sentence is announced under R.C.M. 1007; or
- (ii) in the case of a summary court-martial, the date on which the sentence is approved by the convening authority.

(B) *Automatic Reduction.* An enlisted accused in a pay grade above E-1 whose sentence as set forth in the judgment of a court-martial includes a dishonorable or bad-conduct discharge, confinement, or hard labor without confinement may be reduced automatically to pay grade E-1 if permitted by, and under circumstances provided in, regulations prescribed by the Secretary concerned."

(jj) A new R.C.M. 1104(e) is inserted immediately after R.C.M. 1104(d) to read as follows:

“(e) *Notice to Victims.* A victim must be notified of any post-trial motion, filing, or hearing that may address:

- (1) the findings or sentence of a court-martial with respect to the accused;
- (2) the unsealing of privileged or private information of a victim; or
- (3) any action resulting in the release of an accused.”

(kk) R.C.M. 1106(a) is amended to read as follows:

“(a) *In general.* After a sentence is announced in a court-martial, the accused may submit matters to the convening authority for consideration in the exercise of the convening authority’s powers under R.C.M. 1109, 1110, or 1306.”

(ll) R.C.M. 1106A(a) is amended to read as follows:

“(a) *In general.* In a case with a crime victim, after a sentence is announced in a court-martial any crime victim of an offense of which the accused was found guilty may submit matters to the convening authority for consideration in the exercise of the convening authority’s powers under R.C.M. 1109, 1110, or 1306.”

(mm) R.C.M. 1107(b)(2) is amended to read as follows:

“(2) *Suspension after entry of judgment.* The convening authority who convened the original court-martial, the convening authority’s successor in command, or a convening authority otherwise designated by the Secretary concerned may suspend any part of the unexecuted part of any sentence except a sentence of death, dishonorable discharge, bad-conduct discharge, dismissal, or confinement for more than six months.”

(nn) R.C.M. 1109(e)(3) is amended to read as follows:

“(3) *Who may act.*

- (A) Before entry of judgment, the convening authority who convened the original

court-martial or the convening authority's successor in command may act on the recommendation of trial counsel under paragraph (2).

(B) After entry of judgment, the convening authority who convened the original court-martial or the convening authority's successor in command or a convening authority otherwise designated by the Secretary concerned may act on the recommendation of trial counsel under paragraph (2)."

(oo) R.C.M. 1109(e)(5)(B) is amended to read as follows:

"(B) In the case of a recommendation by trial counsel under paragraph (2) of this subsection made more than one year after entry of judgment, the convening authority who convened the original court-martial or the convening authority's successor in command or a convening authority otherwise designated by the Secretary concerned may reduce a sentence only if the substantial assistance of the accused involved—

(i) Information not known to the accused until one year or more after sentencing;

(ii) Information the usefulness of which could not reasonably have been anticipated by the accused until more than one year after sentencing and which was promptly provided to the Government after its usefulness was reasonably apparent to the accused; or

(iii) Information provided by the accused to the Government within one year of sentencing, but which did not become useful to the Government until more than one year after sentencing."

(pp) R.C.M. 1109(e)(7) is amended to read as follows:

"(7) *Action after entry of judgment.* If the convening authority who convened the original court-martial or the convening authority's successor in command or a convening authority

otherwise designated by the Secretary concerned acts on the sentence of an accused after entry of judgment, the action shall be forwarded to the chief trial judge. The chief trial judge, or a military judge detailed by the chief trial judge, shall modify the judgment of the court-martial to reflect the action. The action and the modified judgment shall be forwarded to the Judge Advocate General and shall be included in the original record of trial. The reduction of a sentence under this rule shall not abridge any right of the accused to appellate review.”

(qq) R.C.M. 1109(g)(2) is amended to read as follows:

“(2) *Action on sentence.* If the convening authority decides to act on the sentence under this rule, such action shall be in writing and shall include a written statement explaining the action. If any part of the sentence is disapproved, reduced, commuted, or suspended, the action shall clearly state which parts or parts are disapproved, reduced, commuted, or suspended. The convening authority’s staff judge advocate or legal advisor shall forward the action with the written explanation to the military judge to be attached to the record of trial.”

(rr) R.C.M. 1111(c) is amended to read as follows:

“(c) *Modification of judgment.* The judgment may be modified as follows—

(1) The military judge who entered a judgment may issue a modified judgment to correct any errors prior to certification of the record of trial under R.C.M. 1112.

(2) The Court of Criminal Appeals, the Court of Appeals for the Armed Forces, and the Judge Advocate General or the Judge Advocate General’s designee may modify a judgment in the performance of their duties and responsibilities.

(3) If a case is remanded to a military judge, the military judge may modify the judgment consistent with the purposes of the remand.

(4) Any modification to the judgment of a court-martial must be included in the record of

trial.”

(ss) R.C.M. 1112(b)(5) is amended to read as follows:

“(5) The election, if any, for application of sentencing rules as in effect on or after January 1, 2019 under R.C.M. 902A; and the election, if any, for sentencing by members in lieu of sentencing by military judge under R.C.M. 1002(b);”

(tt) R.C.M. 1113(b)(3)(C) is amended to read as follows:

“(C) *Disclosure.* Appellate counsel shall not disclose sealed materials in the absence of:

- (i) prior authorization of the Judge Advocate General in the case of review under R.C.M. 1201 or 1210;
- (ii) prior authorization of the appellate court before which a case is pending review under R.C.M. 1203 or 1204; or
- (iii) prior authorization of the Judge Advocate General for a case eligible for review under R.C.M. 1203 or 1204.”

(uu) R.C.M. 1113(b)(3)(D) is amended to read as follows:

“(D) For purposes of this rule, reviewing and appellate authorities are limited to:

- (i) Judge advocates reviewing records pursuant to R.C.M. 1307;
- (ii) Officers and attorneys in the office of the Judge Advocate General reviewing records pursuant to R.C.M. 1201 and 1210;
- (iii) Officers and attorneys designated by the Judge Advocate General;
- (iv) Appellate judges of the Courts of Criminal Appeals and their professional staffs;
- (v) The judges of the United States Court of Appeals for the Armed Forces

and their professional staffs;

(vi) The Justices of the United States Supreme Court and their professional staffs; and

(vii) Any other court of competent jurisdiction.”

(vv) R.C.M. 1115(a) is amended to read as follows:

“(a) *In general.* After any general court-martial, except one in which the judgment entered into the record includes a sentence of death, and after any special court-martial in which the judgment entered into the record includes a finding of guilt, the accused may waive or withdraw the right to appellate review by a Court of Criminal Appeals. The accused may sign a waiver of the right to appeal at any time after entry of judgment and may withdraw an appeal at any time before such review is completed.”

(ww) R.C.M. 1116(c) is amended to read as follows:

“(c) *General and special courts-martial not reviewed by a Court of Criminal Appeals.* General and special courts-martial with a finding of guilty not reviewed by a Court of Criminal Appeals under Article 66(b)(1) or (3) shall be reviewed under Article 65(d)(2).”

(xx) R.C.M. 1201(h) is amended to read as follows:

“(h) *Application for relief to the Judge Advocate General after final review.*

(1) *In general.* Notwithstanding R.C.M. 1209, the Judge Advocate General may, upon application of the accused or a person with authority to act for the accused or receipt of the record pursuant to R.C.M. 1307(g):

(A) With respect to a summary court-martial previously reviewed under R.C.M. 1307, modify or set aside, in whole or in part, the findings and sentence; or

(B) With respect to a general or special court-martial previously reviewed under paragraph (a)(1) or (2), order such a court-martial to be reviewed under R.C.M. 1203 by the Court of Criminal Appeals.

(2) **Timing.** To qualify for consideration under this subsection, an accused must submit an application not later than one year after—

(A) In the case of a summary court-martial, the date of completion of review under R.C.M. 1307; or

(B) In the case of a general or special court-martial, the end of the 90-day period beginning on the date the accused is provided notice of appellate rights under R.C.M. 1116(b)(2).

(3) **Extension.** The Judge Advocate General may, for good cause shown, extend the period for submission of an application under paragraph (h)(2) for a time period not to exceed three additional years. The Judge Advocate General may not consider an application submitted more than three years after the applicable expiration date specified in paragraph (h)(2)."

(yy) R.C.M. 1202(b)(2)(A) is amended to read as follows:

"(A) In every general and special court-martial that includes a finding of guilty, an appellate defense counsel shall be detailed to review the case, unless the accused has waived the right to appeal under Article 61 or submits a written statement declining representation. Upon request, the detailed appellate defense counsel shall represent the accused in accordance with subparagraph (B)."

(zz) A new R.C.M. 1208(c) is inserted immediately after R.C.M. 1208(b) to read as follows:

"(c) *Effective date of sentences.* Once a sentence has been set aside or disapproved, the effective date of a sentence that relates to that portion which was set aside or disapproved shall be calculated from the date a new sentence relating to that portion is adjudged at a new trial, other

trial, or rehearing and shall be in accordance with R.C.M. 1102.”

(aaa) R.C.M. 1304(b)(2)(F) is amended to read as follows:

“(F) *Findings and sentence.*

(i) The summary court-martial shall apply the principles in R.C.M. 918 in determining the findings. The summary court-martial shall announce the findings to the accused in open session.

(ii) The summary court-martial shall follow the procedures in R.C.M. 1001 and 1002 and apply the principles in the remainder of Chapter X in determining a sentence, except as follows:

(I) If an accused is found guilty of more than one offense, a summary court-martial shall determine the appropriate confinement and fine, if any, for all offenses of which the accused was found guilty. The summary court-martial shall not determine or announce separate terms of confinement or fines for each offense; and

(II) The summary court-martial shall announce the sentence to the accused in open session.

(iii) If the sentence includes confinement, the summary court-martial shall advise the accused of the right to apply to the convening authority for deferment of the service of the confinement.

(iv) If the accused is found guilty, the summary court-martial shall advise the accused of the rights under R.C.M. 1306(a) and (h) and R.C.M. 1307(h) after the sentence is announced.

(v) The summary court-martial shall, as soon as practicable, inform the convening authority of the findings, sentence, recommendations, if any, for suspension of the

sentence, and any deferment request.

(vi) If the sentence includes confinement, the summary court-martial shall cause the delivery of the accused to the accused's commanding officer or the commanding officer's designee."

(bbb) R.C.M. 1304(b)(2)(G) is deleted.

Section 2. Part III of the Manual for Courts-Martial, United States, is amended as follows:

(a) Mil. R. Evid. 311(c)(3) is amended to read as follows:

"(3) *Good Faith Exception of a Warrant or Search Authorization:* Evidence that was obtained as a result of an unlawful search or seizure may be used if:

(A) the search or seizure resulted from an authorization to search, seize, or apprehend issued by an individual competent to issue the authorization under Mil. R. Evid. 315(d) or from a search warrant or arrest warrant issued by competent civilian authority, or from such an authorization or warrant issued by an individual whom the officials seeking and executing the authorization or warrant reasonably and with good faith believed was competent to issue the authorization or warrant;

(B) the individual issuing the authorization or warrant had a substantial basis for determining the existence of probable cause or the officials seeking and executing the authorization or warrant reasonably and with good faith believed that the individual issuing the authorization or warrant had a substantial basis for determining the existence of probable cause; and

(C) the officials seeking and executing the authorization or warrant reasonably and with good faith relied on the issuance of the authorization or warrant. Good faith is to be determined using an objective standard."

(b) Mil. R. Evid. 311(d)(4)(B) is amended to read as follows:

“(B) *False Statements.* If the defense makes a substantial preliminary showing that a government agent knowingly and intentionally or with reckless disregard for the truth included a false statement or omitted a material fact in the information presented to the authorizing officer, and if the allegedly false statement or omitted material fact is necessary to the finding of probable cause, the defense, upon request, is entitled to a hearing. At the hearing, the defense has the burden of establishing by a preponderance of the evidence the allegation of knowing and intentional falsity or reckless disregard for the truth. If the defense meets its burden, the prosecution has the burden of proving by a preponderance of the evidence, with the false information set aside, that the remaining information presented to the authorizing officer is sufficient to establish probable cause. If the prosecution does not meet its burden, the objection or motion must be granted unless the search is otherwise lawful under these rules.”

(c) Mil. R. Evid. 315(b)(2) is amended to read as follows:

“(2) “Search warrant” means express permission to search and seize issued by competent civilian authority or under R.C.M. 703A.”

(d) A new Mil. R. Evid. 315(b)(3) is inserted immediately after Mil. R. Evid. 315(b)(2) to read as follows:

“(3) “Warrant for wire or electronic communications” means a warrant issued by a military judge pursuant to 18 U.S.C. §§ 2703(a), (b)(1)(A), or (c)(1)(A) in accordance with 10 U.S.C. § 846(d)(3) and R.C.M. 309(b)(2) and R.C.M. 703A.”

(e) Mil. R. Evid. 315(d) is amended to read as follows:

“(d) *Who May Authorize.* A search authorization under this rule is valid only if issued by an impartial individual in one of the categories set forth in paragraphs (d)(1), (d)(2), and (d)(3) of

this rule. Only a military judge may issue a warrant for wire or electronic communications under this rule. An otherwise impartial authorizing official does not lose impartiality merely because the official is present at the scene of a search or is otherwise readily available to persons who may seek the issuance of a search authorization; nor does such an official lose impartial character merely because the official previously and impartially authorized investigative activities when such previous authorization is similar in intent or function to a pretrial authorization made by the United States district courts.

(1) *Commander*. A commander or other person serving in a position designated by the Secretary concerned as either a position analogous to an officer in charge or a position of command, who has control over the place where the property or person to be searched is situated or found, or, if that place is not under military control, having control over persons subject to military law or the law of war;

(2) *Military Judge or Magistrate*. A military judge or magistrate if authorized under regulations prescribed by the Secretary of Defense or the Secretary concerned; or

(3) *Other competent search authority*. A competent, impartial official as designated under regulations by the Secretary of Defense or the Secretary concerned as an individual authorized to issue search authorizations under this rule.”

(f) Mil. R. Evid. 404(b) is amended to read as follows:

“(b) *Other Crimes, Wrongs, or Acts*.

(1) *Prohibited Uses*. Evidence of any other crime, wrong, or act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.

(2) *Permitted Uses*. This evidence may be admissible for another purpose, such as proving

motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

(3) *Notice in a Criminal Case.* In a criminal case, the trial counsel must:

(A) provide reasonable notice of any such evidence that the trial counsel intends to offer at trial, so the accused has a fair opportunity to meet it;

(B) articulate in the notice the permitted purpose for which the trial counsel intends to offer the evidence and the reasoning that supports the purpose; and

(C) do so in writing before trial—or in any form during trial if the court, for good cause, excuses lack of pretrial notice.”

(g) **Mil. R. Evid. 503 is amended to read as follows:**

“Rule 503. Communications to clergy

(a) *General Rule.* A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergy member or to a clergy member’s assistant, if such communication is made either as a formal act of religion or as a matter of conscience.

(b) *Definitions.* As used in this rule:

(1) “Clergy member” means a minister, priest, rabbi, imam, chaplain, or other similar functionary of a religious organization, or an individual reasonably believed to be so by the person consulting the clergy member.

(2) “Clergy member’s assistant” means a person employed or assigned to assist a clergy member in the clergy member’s capacity as a spiritual advisor.

(3) A communication is “confidential” if made to a clergy member in the clergy member’s capacity as a spiritual advisor or to a clergy member’s assistant in the assistant’s

official capacity and is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the purpose of the communication or to those reasonably necessary for the transmission of the communication.

(c) *Who May Claim the Privilege.* The privilege may be claimed by the person, guardian, or conservator, or by a personal representative if the person is deceased. The clergy member or clergy member's assistant who received the communication may claim the privilege on behalf of the person. The authority of the clergy member or clergy member's assistant to do so is presumed in the absence of evidence to the contrary."

(h) Mil. R. Evid. 611(d)(1) is amended to read as follows:

"(1) In a case involving domestic violence or a case involving the abuse of a child, the military judge must, subject to the requirements of subdivision (d)(3) of this rule, allow a child victim or child witness to testify from an area outside the courtroom as prescribed in R.C.M. 914A."

(i) Mil. R. Evid. 611(d)(2)(E) is amended to read as follows:

"(E) "Domestic violence" means conduct that may constitute an offense under Article 128b."

(j) Mil. R. Evid. 803(16) is amended to read as follows:

"(16) *Statements in Ancient Documents.* A statement in a document that was prepared before January 1, 1998, and whose authenticity is established."

(k) Mil. R. Evid. 803(22) is amended to read as follows:

"(22) *Judgment of a Previous Conviction.* Evidence of a final judgment of conviction if:

(A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;

- (B) the conviction was for a crime punishable by death, dishonorable discharge, or imprisonment for more than a year;
- (C) the evidence is admitted to prove any fact essential to the judgment; and
- (D) when offered by the prosecution for a purpose other than impeachment, the judgment was against the accused.

The pendency of an appeal may be shown but does not affect admissibility. In determining whether a crime tried by court-martial was punishable by death, dishonorable discharge, or imprisonment for more than one year, the maximum punishment prescribed by the President under Article 56 of the Uniform Code of Military Justice at the time of the conviction applies without regard to whether the case was tried by general, special, or summary court-martial.

(I) Mil. R. Evid. 807 is amended to read as follows:

“(a) *In General.* Under the following conditions, a hearsay statement is not excluded by the rule against hearsay even if the statement is not admissible under a hearsay exception in Mil. R. Evid. 803 or 804:

- (1) the statement is supported by sufficient guarantees of trustworthiness—after considering the totality of circumstances under which it is made and evidence, if any, corroborating the statement; and

- (2) the statement is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.

(b) *Notice.* The statement is admissible only if the proponent gives an adverse party reasonable notice of the intent to offer the statement—including its substance and the declarant’s name—so that the party has a fair opportunity to meet it. The notice must be provided in writing before the trial or hearing—or in any form during the trial or hearing if the court, for good cause, excuses a

lack of earlier notice.”

(m) A new Mil. R. Evid. 902(12) is inserted immediately after Mil. R. Evid. 902(11) to read as follows:

“(12) Reserved.”

(n) A new Mil. R. Evid. 902(13) is inserted immediately after new Mil. R. Evid. 902(12) to read as follows:

“(13) *Certified Records Generated by an Electronic Process or System.* A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of Mil. R. Evid. 902(11). The proponent also must meet the notice requirements of Mil. R. Evid. Rule 902(11).”

(o) A new Mil. R. Evid. 902(14) is inserted immediately after new Mil. R. Evid. 902(13) to read as follows:

“(14) *Certified Data Copied from an Electronic Device, Storage Medium, or File.* Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification requirements of Mil. R. Evid. 902(11). The proponent also must meet the notice requirements of Mil. R. Evid. 902(11).”

Section 3. Part IV of the Manual for Courts-Martial, United States, is amended as follows:

(a) Paragraph 3.b.(4) is amended to read as follows:

“(4) *Sua sponte duty.* Subject to R.C.M. 920(g), a military judge must instruct panel members on lesser included offenses reasonably raised by the evidence.”

(b) Paragraph 6.d. is amended to read as follows:

“d. *Maximum punishment.*

(1) *Solicitation of espionage.* Such punishment that a court-martial may direct, other than death.

(2) *Solicitation of desertion; mutiny or sedition; misbehavior before the enemy.* If the offense solicited or advised is committed or attempted, then the accused shall be punished with the punishment provided for the commission of the offense solicited or advised. If the offense solicited or advised is not committed or attempted, then the following punishment may be imposed: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years, or the maximum punishment of the underlying offense, whichever is lesser.

(3) *Solicitation of all other offenses.* Any person subject to the UCMJ who is found guilty of soliciting or advising another person to commit an offense not specified in subparagraph d.(1)-(2) of this paragraph that, if committed by one subject to the UCMJ, would be punishable under the UCMJ, shall be subject to the following maximum punishment: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years, or the maximum punishment of the underlying offense, whichever is lesser.”

(c) Paragraph 19.c.(2) is amended to read as follows:

“(2) *Nature of act.* The cruelty, oppression, or maltreatment, although not necessarily physical, must be measured by an objective standard. Assault, improper punishment, and sexual harassment may constitute this offense if the conduct meets the elements of this offense. Sexual harassment under this paragraph includes influencing, offering to influence, or threatening the career, pay, or job of another person in exchange for sexual favors, and deliberate or repeated offensive comments or gestures of a sexual nature. The imposition of necessary or proper duties

and the exaction of their performance does not constitute this offense even though the duties are arduous or hazardous or both."

(d) Paragraph 20.b. is amended to read as follows:

"b. *Elements.*

(1) *Abuse of training leadership position.*

(a) That the accused was a commissioned, warrant, noncommissioned, or petty officer;

(b) That the accused was in a training leadership position with respect to a specially protected member of the armed forces; and

(c) That the accused engaged in prohibited sexual activity with a person the accused knew was a specially protected junior member of the armed forces.

(2) *Abuse of position as a military recruiter.*

(a) That the accused was a commissioned, warrant, noncommissioned, or petty officer;

(b) That the accused was performing duties as a military recruiter; and

(c) That the accused engaged in prohibited sexual activity with a person the accused knew was an applicant for military service or a specially protected junior member of the armed forces who is enlisted under a delayed entry program."

(e) Paragraph 20.c. is amended to read as follows:

"c. *Explanation.*

(1) *In general.* The prevention of inappropriate sexual activity by trainers, recruiters, and drill instructors with recruits, trainees, students attending service academies, and other potentially vulnerable persons in the initial training environment is crucial to the maintenance of

good order and military discipline. Military law, regulation, and custom invest officers, non-commissioned officers, drill instructors, recruiters, cadre, and others with the right and obligation to exercise control over those they supervise. In this context, inappropriate sexual activity between those potentially vulnerable persons and those with authority to exercise control over them is inherently destructive to good order and discipline.

(2) *Prohibited activity.* The responsibility for identifying relationships subject to this offense and those outside the scope of this offense is entrusted to the individual Services to determine and specify by appropriate regulations. This offense is intended to cover those situations that involve the improper use of authority by virtue of an individual's position in either a training or recruiting environment. Not all contact or associations are prohibited by this article. Service regulations must consider circumstances where pre-existing relationships (for example, marriage relationships) exist. Additionally, this offense criminalizes only activity occurring when there is a training or recruiting relationship between the accused and the alleged victim of this offense.

(3) *Knowledge.* The accused must have actual or constructive knowledge that a person was a "specially protected junior member of the armed forces" or an "applicant for military service" (as those terms are defined in this offense). Knowledge may be proved by circumstantial evidence.

(4) *Consent.* Consent is not a defense to this offense."

(f) Paragraph 20.e. is amended to read as follows:

"e. *Sample specifications.*

(1) *Prohibited act with specially protected junior member of the armed forces.*

In that ____ (personal jurisdiction data), a (commissioned) (warrant) (noncommissioned) (petty)

officer, while in a training leadership position over ___, did (at/on board—location) (subject-matter jurisdiction data, if required), on or about ___ 20 __, engage in a prohibited act, to wit:
_____ with _____, whom the accused knew was a specially protected junior Servicemember in initial active duty training.

(2) Prohibited act with an applicant for military service.

In that ___ (personal jurisdiction data), a (commissioned) (warrant) (noncommissioned) (petty) officer, while in a training leadership position over ___, did (at/on board—location) (subject-matter jurisdiction data, if required), on or about ___ 20 __, engage in a prohibited act, to wit:
_____ with _____, whom the accused knew was (an applicant for military service) (a specially protected junior member of the armed forces who is enlisted under a delayed entry program)."

(g) Paragraph 51.e. is amended to read as follows:

"e. Sample specification.

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about ___ 20 __, (in the motor pool area) (near the Officers' Club) (at the intersection of _____ and _____) (while in the Gulf of Mexico) (while in flight over North America) physically control [a vehicle, to wit: (a truck) (a passenger car) (_____) [an aircraft, to wit: (an AH-64 helicopter) (an F-14A fighter) (a KC-135 tanker) (_____) [a vessel, to wit: (the aircraft carrier USS _____) (the Coast Guard Cutter _____) (_____) (_____)], [while drunk] [while impaired by _____] [while the alcohol concentration in (his) (her) (blood or breath) equaled or exceeded the applicable limit under subsection (b) of the text of the statute in paragraph 51 as shown by chemical analysis] [in a (reckless) (wanton) manner by (attempting to pass another vehicle on a sharp curve) (ordering

that the aircraft be flown below the authorized altitude)] [and did thereby cause said (vehicle) (aircraft) (vessel) to (strike and) (injure _____)].”

(h) Paragraph 55. is amended by deleting the following:

“[NOTE: For Article 117a, UCMJ, Wrongful broadcast, *See Appendix 2, Article 117a, UCMJ*”

(i) Paragraph 60.e.(3) is amended to read as follows:

“(3) *Aggravated sexual contact.*

(a) *By force.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20____, [(touch) (cause ____ to touch)] [(directly) (through the clothing)] the (vulva) (penis) (scrotum) (anus) (groin) (breast) (inner thigh) (buttocks) of _____, with [(_____'s body part) (an object), to wit: _____] with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____] by using unlawful force.

(b) *By force causing or likely to cause death or grievous bodily harm.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20____, [(touch) (cause ____ to touch)] [(directly) (through the clothing)] the (vulva) (penis) (scrotum) (anus) (groin) (breast) (inner thigh) (buttocks) of _____, with [(_____'s body part) (an object), to wit: _____] with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____], by using force likely to cause death or grievous bodily harm to _____, to wit: _____.

(c) *By threatening or placing that other person in fear that any person would be*

subjected to death, grievous bodily harm, or kidnapping.

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20____, [(touch) (cause ____ to touch)] [(directly) (through the clothing)] the (vulva) (penis) (scrotum) (anus) (groin) (breast) (inner thigh) (buttocks) of _____, with [(_____'s body part) (an object), to wit: _____] with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____], by (threatening _____) (placing _____ in fear) that _____ would be subjected to (death) (grievous bodily harm) (kidnapping).

(d) *By first rendering that other person unconscious.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20____, [(touch) (cause ____ to touch)] [(directly) (through the clothing)] the (vulva) (penis) (scrotum) (anus) (groin) (breast) (inner thigh) (buttocks) of _____, with [(_____'s body part) (an object), to wit: _____] with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____], by rendering _____ unconscious by _____.

(e) *By administering a drug, intoxicant, or other similar substance.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20____, [(touch) (cause ____ to touch)] [(directly) (through the clothing)] the (vulva) (penis) (scrotum) (anus) (groin) (breast) (inner thigh) (buttocks) of _____, with [(_____'s body part) (an object), to wit: _____] with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____], by administering to _____ (by force) (by threat of force) (without the knowledge or permission of _____) a (drug) (intoxicant) (_____) thereby substantially impairing the

ability of _____ to appraise or control (his) (her) conduct."

(j) Paragraph 60.e.(4) is amended to read as follows:

"(4) Abusive sexual contact.

(a) By threatening or placing that other person in fear.

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20_____, [(touch) (cause ____ to touch)] [(directly) (through the clothing)] the (vulva) (penis) (scrotum) (anus) (groin) (breast) (inner thigh) (buttocks) of _____, with [(_____'s body part) (an object), to wit: _____] with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____], by (threatening _____) (placing _____ in fear).

(b) By fraudulent representation.

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20_____, [(touch) (cause ____ to touch)] [(directly) (through the clothing)] the (vulva) (penis) (scrotum) (anus) (groin) (breast) (inner thigh) (buttocks) of _____, with [(_____'s body part) (an object), to wit: _____] with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____], by making a fraudulent representation that the sexual contact served a professional purpose, to wit: _____.

(c) By false pretense.

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20_____, [(touch) (cause ____ to touch)] [(directly) (through the clothing)] the (vulva) (penis) (scrotum) (anus) (groin) (breast) (inner thigh) (buttocks) of _____, with [(_____'s body part) (an object), to wit: _____] with an

intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____], by inducing a belief by (artifice) (pretense) (concealment) that the said accused was another person.

(d) *Without consent.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20____, [(touch) (cause ____ to touch)] [(directly) (through the clothing)] the (vulva) (penis) (scrotum) (anus) (groin) (breast) (inner thigh) (buttocks) of _____, with [(_____'s body part) (an object), to wit: _____] with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____] without the consent of _____.

(e) *Of a person who is asleep, unconscious, or otherwise unaware the act is occurring.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20____, [(touch) (cause ____ to touch)] [(directly) (through the clothing)] the (vulva) (penis) (scrotum) (anus) (groin) (breast) (inner thigh) (buttocks) of _____, with [(_____'s body part) (an object), to wit: _____] with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____], when (he) (she) (knew) (reasonably should have known) that _____ was (asleep) (unconscious) (unaware the sexual contact was occurring due to _____).

(f) *When that person is incapable of consenting.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20____, [(touch) (cause ____ to touch)] [(directly) (through the clothing)] the (vulva) (penis) (scrotum) (anus) (groin) (breast) (inner

thigh) (buttocks) of _____, with [(_____'s body part) (an object), to wit: _____] with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____], when _____ was incapable of consenting to the sexual contact because (he) (she) [was impaired by (a drug, to wit: _____) (an intoxicant, to wit: _____) (_____) [had a (mental disease, to wit: _____) (mental defect, to wit: _____) (physical disability, to wit: _____)] and the accused (knew) (reasonably should have known) of that condition."

(k) Paragraph 63.b. is amended to read as follows:

“b. *Elements.*

(1) *Indecent viewing.*

(a) That the accused, without legal justification or lawful authorization, knowingly and wrongfully viewed the private area of another person;
(b) That said viewing was without the other person's consent; and
(c) That said viewing took place under circumstances in which the other person had a reasonable expectation of privacy.

(2) *Indecent recording.*

(a) That the accused, without legal justification or lawful authorization, knowingly recorded (photographed, videotaped, filmed, or recorded by any means) the private area of another person;
(b) That said recording was without the other person's consent; and
(c) That said recording was made under circumstances in which the other person had a reasonable expectation of privacy.

(3) *Broadcasting of an indecent recording.*

- (a) That the accused, without legal justification or lawful authorization, knowingly broadcast a certain recording of another person's private area;
- (b) That said recording was made without the other person's consent;
- (c) That the accused knew or reasonably should have known that the recording was made without the other person's consent;
- (d) That said recording was made under circumstances in which the other person had a reasonable expectation of privacy; and
- (e) That the accused knew or reasonably should have known that said recording was made under circumstances in which the other person had a reasonable expectation of privacy.

(4) Distribution of an indecent recording.

- (a) That the accused, without legal justification or lawful authorization, knowingly distributed a certain recording of another person's private area;
- (b) That said recording was made without the other person's consent;
- (c) That the accused knew or reasonably should have known that said recording was made without the other person's consent;
- (d) That said recording was made under circumstances in which the other person had a reasonable expectation of privacy; and
- (e) That the accused knew or reasonably should have known that said recording was made under circumstances in which the other person had a reasonable expectation of privacy.

(5) Forcible pandering.

That the accused compelled another person to engage in an act of prostitution with any

person.

(6) *Indecent exposure.*

- (a) That the accused exposed the accused's genitalia, anus, buttocks, or female areola or nipple;
- (b) That the exposure was in an indecent manner; and
- (c) That the exposure was intentional."

(l) Paragraph 63.e.(1) is amended to read as follows:

"e. *Sample specifications.*

(1) *Indecent viewing, recording, or broadcasting.*

(a) *Indecent viewing.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20_____, without legal justification or lawful authorization, knowingly and wrongfully view the private area of _____, without (his) (her) consent and under circumstances in which (he) (she) had a reasonable expectation of privacy.

(b) *Indecent recording.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20_____, without legal justification or lawful authorization, knowingly (photograph) (videotape) (film) (make a recording of) the private area of _____, without (his) (her) consent and under circumstances in which (he) (she) had a reasonable expectation of privacy.

(c) *Broadcasting or distributing an indecent recording.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter

jurisdiction, if required), on or about _____ 20_____, without legal justification or lawful authorization, knowingly (broadcast) (distribute) a recording of the private area of _____, when the said accused knew or reasonably should have known that the said recording was made without the consent of _____ and under circumstances in which (he) (she) had a reasonable expectation of privacy.”

(m) Paragraph 64.d.(1)(c) is amended to read as follows:

“(c) *Property other than military property of a value of more than \$1,000 or any motor vehicle, aircraft, vessel, firearm, or explosive not included in subparagraph d.(1)(b).* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.”

(n) Paragraph 69.c.(1) is amended to read as follows:

“(1) *Access.* “Access” means to gain entry to, instruct, cause input to, cause output from, cause data processing with, or communicate with, the logical, arithmetical, or memory function resources of a computer, computer system, or computer network.”

(o) Paragraph 77.d.(1) is amended to read as follows:

“(1) *Simple assault.*

(a) *Generally.* Confinement for 3 months and forfeiture of two-thirds pay per month for 3 months.

(b) *When committed with an unloaded firearm or other dangerous weapon.*

Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(c) *When committed with a loaded firearm.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 4 years.”

(p) Paragraph 77.d.(5) is amended to read as follows:

“(5) *Assault with intent to commit specified offenses.*

(a) *Assault with intent to commit murder, rape, or rape of a child.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(b) *Assault with intent to commit voluntary manslaughter, robbery, arson, burglary, kidnapping, sexual assault, or sexual assault of a child.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.”

(q) Paragraph 78. is amended by deleting:

“[NOTE: For Article 128b, UCMJ, Domestic Violence, added as part of the FY19 National Defense Authorization Act, *See Appendix 2, Article 128b, UCMJ*]”

(r) Paragraph 89.c.(2) is amended to read as follows:

“(2) *Personnel action.* For purposes of this offense, “personnel action” means—
(a) any action taken on a Servicemember that affects, or has the potential to affect, that Servicemember’s current position or career, including promotion; disciplinary or other corrective action; transfer or reassignment; performance evaluations; decisions concerning pay, benefits, awards, or training; relief and removal; separation; discharge; referral for mental health evaluations; and any other personnel actions as defined by law or regulation, such as 5 U.S.C. § 2302 and DoD Directive 7050.06 (17 April 2015); or,

(b) any action taken on a civilian employee that affects, or has the potential to affect, that person’s current position or career, including promotion; disciplinary or other corrective action; transfer or reassignment; performance evaluations; decisions concerning pay, benefits, awards, or training; relief and removal; discharge; and any other personnel actions as defined by law or regulation such as 5 U.S.C. § 2302.”

(s) The title of Paragraph 90 is amended to read as follows:

“90. Article 133 (10 U.S.C. 933)—Conduct unbecoming an officer”

(t) Paragraph 90.a. is amended to read as follows:

“a. *Text of statute.*

Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer shall be punished as a court-martial may direct.”

(u) Paragraph 90.b. is amended to read as follows:

“b. Elements.

- (1) That the accused was a commissioned officer, cadet, or midshipman;
- (2) That the accused did or omitted to do certain acts; and
- (3) That, under the circumstances, these acts or omissions constituted conduct unbecoming an officer.”

(v) Paragraph 90.c. is amended to read as follows:

“c. Explanation.

(1) *Officership generally.* As used in the phrase “conduct unbecoming an officer” in this article, “officer” refers to a “commissioned officer, cadet, or midshipman.”

(2) *Nature of the offense.* The focus of this article is conduct that is likely to seriously compromise the accused’s standing as an officer. A military officer holds a particular position of responsibility in the armed forces, and one critically important responsibility of a military officer is to inspire the trust and respect of the personnel who must obey the officer’s orders. Conduct violative of this article is action or behavior in an official capacity that, in dishonoring or disgracing the person as an officer, seriously compromises the officer’s character, or action or behavior in an unofficial or private capacity that, in dishonoring or disgracing the officer personally, seriously compromises the person’s standing as an officer. This article includes misconduct that approximates, but may not meet every element of, another enumerated offense.

An officer's conduct need not violate other provisions of the UCMJ or be otherwise criminal to violate Article 133. The gravamen of the offense is that the officer's conduct disgraces the officer personally or brings dishonor to the military profession in a manner that affects the officer's fitness to command the obedience of the officer's subordinates so as to effectively complete the military mission. The absence of a "custom of the service," statute, regulation, or order expressly prohibiting certain conduct is not dispositive of whether the officer was on sufficient notice that such conduct was unbecoming.

(3) *Examples of offenses.* Instances of violation of this article include knowingly making a false official statement; dishonorable failure to pay a debt; cheating on an exam; opening and reading a letter of another without authority; using insulting or defamatory language to another officer in that officer's presence or about that officer to other military persons; being drunk and disorderly in a public place; committing or attempting to commit a crime involving moral turpitude; and failing without good cause to support the officer's family.

(4) *Relation to Other Punitive Articles:* This article includes acts made punishable by any other article, provided these acts amount to conduct unbecoming an officer. Thus, a commissioned officer who steals property violates both this article and Article 121. Whenever the offense charged is the same as a specific offense set forth in this Manual, the elements of proof are the same as those set forth in the paragraph that treats that specific offense, with the additional requirement that the act or omission constitutes conduct unbecoming an officer."

(w) Paragraph 91.c.(4)(a)(1)(iii) is as amended to read as follows:

(iii) The Federal Assimilative Crimes Act (18 U.S.C. § 13) is an adoption by Congress of state criminal laws for areas of exclusive or concurrent federal jurisdiction, provided federal criminal law, including the UCMJ, has not defined an applicable

offense for the misconduct committed. The Act applies to state laws validly existing at the time of the offense without regard to when these laws were enacted, whether before or after passage of the Act, and whether before or after the acquisition of the land where the offense was committed. For example, if a person committed an act on a military installation in the United States at a certain location over which the United States had either exclusive or concurrent jurisdiction, and it was not an offense specifically defined by federal law (including the UCMJ), that person could be punished for that act by a court-martial if it was a violation of a noncapital offense under the law of the State where the military installation was located. This is possible because the Act adopts the criminal law of the State wherein the military installation is located and applies it as though it were federal law. As amended, the Act provides that: “Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, or on, above, or below any portion of the territorial sea of the United States not within the jurisdiction of any State, Commonwealth, territory, possession, or district is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.”

Section 4. Part V of the Manual for Courts-Martial, United States, is amended as follows:

(a) Paragraph 1.f.(4) is amended to read as follows:

“(4) *Statute of limitations.* Except as provided in Article 43(c) and (d), nonjudicial punishment may not be imposed for offenses which were committed more than 2 years before the date of imposition, unless knowingly and voluntarily waived by the member. *See Article 43(b)(3).*”

(b) Paragraph 1.h. is amended to read as follows:

“h. Applicable standards. The burden of proof to be utilized by commanders throughout the nonjudicial punishment process shall be a preponderance of the evidence.”

(c) A new paragraph 1.j. is inserted immediately after paragraph 1.i. to read as follows:

“j. *Service regulations and procedures.* Unless otherwise provided, the Service regulations and procedures of the Servicemember shall apply.

(d) Paragraph 4.c.(4) is amended to read as follows:

“(4) Decision. After considering all relevant matters presented by a preponderance of the evidence standard, if the nonjudicial punishment authority—

(A) does not conclude that the Servicemember committed the offenses alleged, the nonjudicial punishment authority shall so inform the member and terminate the proceedings;

(B) concludes that the Servicemember committed one or more of the offenses alleged, the nonjudicial punishment authority shall:

(i) so inform the Servicemember;

(ii) inform the Servicemember of the punishment imposed; and

(iii) inform the Servicemember of the right to appeal (see paragraph 7 of this Part).”

ANNEX 2**Section 1. Part I of the Manual for Courts-Martial, United States, is amended as follows:****(a) Paragraph 3 is amended to read as follows:****“3. Nature and purpose of military law**

Military law consists of the statutes governing the military establishment and regulations issued thereunder, the constitutional powers of the President and Executive Orders and regulations issued thereunder, and the inherent authority of military commanders. Military law includes jurisdiction exercised by courts-martial and the jurisdiction exercised by commanders with respect to nonjudicial punishment. The purposes of military law are to promote justice, to deter misconduct, to facilitate appropriate accountability, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.”

(b) Paragraph 4 is redesignated as Paragraph 5 and is amended to read as follows:**“5. Structure and application of the Manual for Courts-Martial**

The Manual for Courts-Martial shall consist of this Preamble, the Rules for Courts-Martial, the Military Rules of Evidence, the Punitive Articles, the Nonjudicial Punishment Procedures (Parts I-V), and Appendixes 12A through 12D. This Manual shall be applied in a manner consistent with the purpose of military law.

The Department of Defense (DoD), in conjunction with the Department of Homeland Security, publishes supplementary materials to accompany the Manual for Courts-Martial. These materials consist of a Preface, a Table of Contents, Discussions, Appendices (other than Appendixes 12A through 12D, which were promulgated by the President), and an Index. These supplementary materials do not have the force of law.

The Manual shall be identified by the year in which it was printed; for example, “Manual for Courts-Martial, United States (20xx edition).” Any amendments to the Manual made by Executive Order shall be identified as “20xx” Amendments to the Manual for Courts-Martial, United States, “20xx” being the year the Executive Order was signed.

The DoD-Joint Service Committee on Military Justice (JSC) reviews the Manual for Courts-Martial and proposes amendments to the DoD-for consideration by the President on an annual basis. In conducting its annual review, the JSC is guided by DoD Instruction 5500.17, “Role and Responsibilities of the Joint Service Committee on Military Justice (JSC).” DoD Instruction 5500.17 includes provisions allowing public participation in the annual review process.”

(c) A new paragraph 4 is inserted immediately after paragraph 3 to read as follows:

“4. The Evolving Military Justice System

The military operates a modern criminal justice system that recognizes and protects the rights of both the victims of alleged offenses and those accused of offenses. The continuous evolution of the military justice system has progressed through statutes, Executive Orders, regulations, and judicial interpretations. The Uniform Code of Military Justice (UCMJ), enacted in 1950, significantly enhanced the fairness of military justice across the armed forces, including by establishing a civilian appellate court at the system’s apex. The Military Justice Act of 1968, which created the position of military judge and enhanced the role of lawyers in the system, resulted in further improvements. The promulgation of the Military Rules of Evidence by a 1980 Executive Order brought court-martial practice into closer alignment with federal civilian criminal practice. In 2014, Congress added a victims’ rights article to the UCMJ and also made counsel available to represent certain victims of alleged UCMJ offenses. The Military Justice Act

of 2016 further modernized the military justice system by expanding pretrial judicial authorities, updating trial and post-trial procedures, and enacting new punitive articles. Most recently, the National Defense Authorization Act for Fiscal Year 2022 made historic reforms to the military justice system, including the unprecedented transfer of prosecutorial discretion from commanders to independent, specialized counsel to prosecute certain covered offenses, including sexual assault and domestic violence, as recommended by the Independent Review Commission on Sexual Assault in the Military to strengthen Service members' trust in the military justice system. These and many other improvements have been vital to maintaining a fair, just, and efficient military justice system. The system must continue to evolve to be worthy of those who protect our Nation and its freedoms.”

Section 2. Part II of the Manual for Courts-Martial, United States, is amended as follows:

(a) R.C.M. 103 is amended to read as follows:

“Rule 103. Definitions and rules of construction

The following definitions and rules of construction apply throughout this Manual, unless otherwise expressly provided.

(1) “Appellate military judge” means a judge of a Court of Criminal Appeals.

(2) “Article” refers to articles of the Uniform Code of Military Justice unless the context indicates otherwise.

(3) “Capital case” means a general court-martial to which a capital offense has been referred with an instruction that the case be treated as a capital proceeding, and, in the case of a rehearing or new or other trial, for which offense death remains an authorized punishment under R.C.M. 810(d).

(4) “Capital offense” means an offense for which death is an authorized punishment under the UCMJ and Part IV of this Manual or under the law of war.

(5) “Commander” means a commissioned officer in command or an officer in charge except in Part V or unless the context indicates otherwise.

(6) “Convening authority” includes a commissioned officer in command for the time being and successors in command.

(7) “Copy” means an accurate reproduction, however made. Whenever necessary and feasible, a copy may be made by handwriting.

(8) “Court-martial” includes, depending on the context:

(A) The military judge and members of a general or special court-martial;

(B) The military judge when a session of a general or special court-martial is conducted without members under Article 39(a);

(C) The military judge when a request for trial by military judge alone has been approved under R.C.M. 903;

(D) The military judge when the case is referred as a special court-martial consisting of a military judge alone under Article 16(c)(2)(A); or

(E) The summary court-martial officer.

(9) “Days.” When a period of time is expressed in a number of days, the period shall be in calendar days, unless otherwise specified. Unless otherwise specified, the date on which the period begins shall not count, but the date on which the period ends shall count as one day.

(10) “Deferral” of an offense means a special trial counsel declines to prefer charges for an offense or declines to refer charges to court-martial. Once a special trial counsel declines to

prefer or refer charges for an offense, a commander shall exercise authority within the scope of these rules.

(11) "Detail" means to order a person to perform a specific temporary duty, unless the context indicates otherwise.

(12) "Exercise authority over" means when a special trial counsel acts on a covered, related, or known offense in furtherance of a special trial counsel's statutory duties or authorities under Article 24a(c).

(13) "Explosive" means gunpowders; powders used for blasting; all forms of high explosives; blasting materials; fuzes (other than electrical circuit breakers), detonators, and other detonating agents; smokeless powders; any explosive bomb, grenade, missile, or similar device; any incendiary bomb or grenade, fire bomb, or similar device; and any other compound, mixture, or device which is an explosive within the meaning of 18 U.S.C. § 232(5) or 844(j).

(14) "Firearm" means any weapon that is designed to or may be readily converted to expel any projectile by the action of an explosive.

(15) "Joint" in connection with military organization connotes activities, operations, organizations, and the like in which elements of more than one military service of the same nation participate.

(16) "Lead Special Trial Counsel" within the Department of Defense means a general or flag officer with significant experience in military justice who is responsible for a dedicated office within each Military Department from which office the Lead Special Trial Counsel will provide for the overall supervision and oversight of the activities of the special trial counsel of a Military Department or Military Service, and who reports directly to the Secretary concerned, without intervening authority.

(17) "Members." The members of a court-martial are the voting members detailed by the convening authority.

(18) "Military judge" means a judge advocate designated under Article 26(c) who is detailed under Article 26(a) or Article 30a to preside over a general or special court-martial or proceeding before referral. In the context of a summary court-martial, "military judge" means the summary court-martial officer. In the context of a pre-referral proceeding or a special court-martial consisting of a military judge alone, "military judge" includes a military magistrate designated under Article 19 or Article 30a.

(19) "Military magistrate" means a commissioned officer of the armed forces certified under Article 26a who is performing duties under Article 19 or 30a.

(20) "Party," in the context of parties to a court-martial or other proceeding under these rules, means:

(A) The accused and any defense or associate or assistant defense counsel and agents of the defense counsel when acting on behalf of the accused with respect to the court-martial or proceeding in question; and

(B) Any trial or assistant trial counsel representing the United States, and agents of the trial counsel or such counsel when acting on behalf of the United States with respect to the court-martial or proceeding in question.

(21) "Preferral" is the act by which a person subject to the UCMJ formally accuses another person subject to the UCMJ of an offense, in accordance with R.C.M. 307(b).

(22) "Referral" is the order of a convening authority or a special trial counsel that one or more charges and specifications against an accused will be tried by a specified court-martial.

(23) "Referral authority" means a convening authority or special trial counsel who may

order that one or more charges and specifications against an accused be tried by a specified court-martial pursuant to R.C.M. 601.

(24) "Special trial counsel" means a judge advocate who is qualified, certified, and assigned as such by the Judge Advocate General of the armed force of which the officer is a member, or, in the case of the Marine Corps, by the Staff Judge Advocate to the Commandant of the Marine Corps, and who is independent of the military chains of command of both the victim and those accused of covered offenses over which a special trial counsel at any time exercises authority in accordance with Article 24a. Special trial counsel shall be well-trained, experienced, highly skilled and competent in handling cases involving covered offenses. Within the Department of Defense, special trial counsel work within dedicated offices under the overall supervision and oversight of a Lead Special Trial Counsel. Within the Coast Guard, special trial counsel work under the overall supervision and oversight of an officer designated under regulations prescribed by the Commandant of the Coast Guard.

(25) "Staff judge advocate" means a judge advocate so designated in the Army, Air Force, or Marine Corps, and means the principal legal advisor of a command in the Navy and Coast Guard who is a judge advocate.

(26) "*Sua sponte*" means that the person involved acts on that person's initiative, without the need for a request, motion, or application.

(27) "Trial counsel," unless otherwise specified in these rules, includes special trial counsel.

(28) "UCMJ" refers to the Uniform Code of Military Justice.

(29) "War, time of." For purposes of R.C.M. 1004(c)(6) and of implementing the applicable paragraphs of Parts IV and V of this Manual only, "time of war" means a period of

war declared by Congress, or the factual determination by the President that the existence of hostilities warrants a finding that a “time of war” exists for purposes of R.C.M. 1004(c)(6) and Parts IV and V of this Manual.

(30) The terms “writings” and “recordings” have the same meaning as in Mil. R. Evid. 1001.

(31) The definitions and rules of construction in 1 U.S.C. §§ 1 through 5 and in 10 U.S.C. §§ 101 and 801.”

(b) R.C.M. 104(b)(2) is amended to read as follows:

“(2) *All persons subject to the UCMJ.* No person subject to the UCMJ may attempt to coerce or, by any unauthorized means, attempt to influence the action of:

(A) a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case or the action of any case; or

(B) any preliminary hearing officer or convening, referral, approving, or reviewing authority with respect to such preliminary hearing officer’s or authority’s acts concerning the following:

(i) any decision to place a service member into pretrial confinement;

(ii) disposition decisions;

(iii) rulings on pre-referral matters;

(iv) findings at a preliminary hearing;

(v) convening a court-martial;

(vi) decisions concerning plea agreements;

(vii) selecting members;

(viii) decisions concerning witness requests;

- (ix) taking action on the findings or sentence;
- (x) taking action on any clemency or deferment request; or
- (xi) any appellate or post-trial review of a case.”

(c) R.C.M. 104(c) is amended to read as follows:

“(c) *Prohibitions concerning evaluations.*

(1) *Evaluation of members, defense counsel, and special victims' counsel.* In the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the armed forces, or in determining whether a member of the armed forces should be retained on active duty, no person subject to the UCMJ may:

(A) Consider or evaluate the performance of duty of any such person as a member of a court-martial; or

(B) Give a less favorable rating or evaluation of any defense counsel or special victims' counsel because of the zeal with which such counsel represented any client. As used in this rule, “special victims' counsel” are judge advocates and civilian counsel, who, in accordance with 10 U.S.C. § 1044e, are designated as Special Victims' Counsel.”

(d) R.C.M. 105 is amended to read as follows:

“Rule 105. Direct communications: convening authorities and staff judge advocates;

among staff judge advocates; with special trial counsel

(a) *Convening authorities and staff judge advocates.* Convening authorities shall at all times communicate directly with their staff judge advocates in matters relating to the administration of military justice, and may communicate directly with special trial counsel, although any input by

the convening authority regarding case dispositions shall be non-binding on the special trial counsel for cases involving covered, known, and related offenses.

(b) *Among staff judge advocates and with the Judge Advocate General.* The staff judge advocate of any command is entitled to communicate directly with the staff judge advocate of a superior or subordinate command, the Judge Advocate General, or, in the case of the Marine Corps, the Staff Judge Advocate to the Commandant of the Marine Corps.

(c) *Communications among special trial counsel, staff judge advocates, and convening authorities.* Special trial counsel, staff judge advocates, and convening authorities may communicate directly while ensuring that all communications regarding case disposition for covered, related, and known offenses are non-binding on the special trial counsel.

(d) *Free from unlawful or unauthorized influence or coercion.* All communications referenced in this rule shall be free from unlawful or unauthorized influence or coercion.”

(e) R.C.M. 201(d)(2) is amended to read as follows:

“(2) An act of omission that violates both the UCMJ and local criminal law, foreign or domestic, may be tried by a court-martial, or by a proper civilian tribunal, foreign or domestic, or, subject to R.C.M. 907(b)(2)(C) and regulations of the Secretary concerned, by both.”

(f) R.C.M. 201(f)(1)(D) is amended to read as follows:

“(D) *Jurisdiction for Certain Sexual Offenses.* Only a general court-martial has jurisdiction to try offenses under Articles 120(a), 120(b), 120b(a), and 120b(b), and attempts thereof under Article 80.”

(g) R.C.M. 201(f)(2)(C) is amended to read as follows:

“(C) *Capital offenses.*

(i) A capital offense for which there is prescribed a mandatory punishment beyond the punitive power of a special court-martial shall not be referred to such a court-martial.

(ii) Other than offenses described in (C)(i):

(I) a general court-martial convening authority over the command that includes the accused may permit any capital offense to be referred to a special court-martial for trial.

(II) a special trial counsel exercising authority over a capital offense may refer such an offense to a special court-martial for trial.

(III) The Secretary concerned may authorize, by regulation, special court-martial convening authorities to refer capital offenses to trial by a special court-martial without first obtaining the consent of the general court-martial convening authority.”

(h) R.C.M. 301 is amended to read as follows:

“Rule 301. Report of offense

(a) *Who may report.* Any person may report an offense subject to trial by court-martial.

(b) *To whom reports are conveyed.* Ordinarily, any military authority who receives a report of an offense shall forward as soon as practicable the report and any accompanying information to the immediate commander of the suspect. Competent authority superior to that commander may direct otherwise.

(c) *Special trial counsel.* All reports of covered offenses shall be forwarded promptly to a special trial counsel. A special trial counsel shall have the authority to determine whether a reported offense is a covered, known, or related offense in accordance with R.C.M. 303A.”

(i) R.C.M. 302(b)(1) is amended to read as follows:

“(1) *Military law enforcement officials*. Persons designated by proper authorities to perform military criminal investigative, guard, or police duties, whether subject to the UCMJ or not, when in each of the foregoing instances, the official making the apprehension is in the execution of law enforcement duties;”

(j) R.C.M. 302(c) is amended to read as follows:

“(c) *Grounds for apprehension*. A person subject to the UCMJ or trial thereunder may be apprehended for an offense triable by court-martial upon probable cause to apprehend. Probable cause to apprehend exists when there is a reasonable belief that an offense has been or is being committed and the person to be apprehended committed or is committing it. Persons authorized to apprehend under R.C.M. 302(b)(2) may also apprehend persons subject to the UCMJ who take part in quarrels, frays, or disorders, wherever they occur.”

(k) R.C.M. 303 is amended to read as follows:

“Rule 303. Preliminary inquiry into reported offenses

Except for covered offenses as defined by Article 1(17), upon receipt of information that a member of the command is accused or suspected of committing an offense or offenses triable by court-martial, the immediate commander shall make or cause to be made a preliminary inquiry into the charges or suspected offenses. A commander who receives a report of a covered offense shall promptly forward the report to a special trial counsel in accordance with R.C.M. 301(c) and regulations prescribed by the Secretary concerned.”

(l) A new R.C.M. 303A is inserted immediately after R.C.M. 303 to read as follows:

“Rule 303A. Determination by special trial counsel to exercise authority

(a) *Initial determination*. A special trial counsel has the exclusive authority to determine if a reported offense is a covered offense.

(b) *Covered offense.* If a special trial counsel determines that a reported offense is a covered offense or receives a preferred charge alleging a covered offense, a special trial counsel shall exercise authority over that covered offense.

(c) *Related offenses.* If a special trial counsel exercises authority pursuant to R.C.M. 303A(b), the special trial counsel may also exercise authority over any reported offense or charge related to a covered offense, whether alleged to have been committed by the suspect of the covered offense or by anyone else subject to the UCMJ.

(d) *Known offenses.* If a special trial counsel exercises authority pursuant to R.C.M. 303A(b), the special trial counsel may also exercise authority over any offense or charge alleged to have been committed by the suspect of the covered offense.

(e) *Notification to command.* When a special trial counsel exercises authority over any reported offense, the special trial counsel shall notify the officer exercising special court-martial convening authority over the suspect.”

(m) R.C.M. 305 is amended to read as follows:

“Rule 305. Pretrial confinement

(a) *In general.* Pretrial confinement is physical restraint, imposed by order of competent authority, depriving a person of freedom pending disposition of charges.

(b) *Who may be confined.* Any person who is subject to trial by court-martial may be confined if the requirements of this rule are met.

(c) *Who may order confinement.* See R.C.M. 304(b).

(d) *When a person may be confined.* No person may be ordered into pretrial confinement except for probable cause. Probable cause to order pretrial confinement exists when there is a reasonable belief that:

- (1) An offense triable by court-martial has been committed;
- (2) The person confined committed it; and
- (3) Confinement is required by the circumstances.

(e) *Advice to the accused upon confinement.* Each person confined shall be promptly informed of:

- (1) The nature of the offenses for which held;
- (2) The right to remain silent and that any statement made by the person may be used against the person;
- (3) The right to retain civilian counsel at no expense to the United States, and the right to request assignment of military counsel; and

- (4) The procedures by which pretrial confinement will be reviewed.

(f) *Notification to Special Trial Counsel.* If a person who is alleged to have committed a covered offense is ordered into or released from pretrial confinement, the individual ordering confinement or authorizing release shall immediately notify a special trial counsel in accordance with regulations prescribed by the Secretary concerned.

(g) *Military counsel.* If requested by the confinee and such request is made known to military authorities, military counsel shall be provided to the confinee before the initial review under R.C.M. 305(j) or within 72 hours of such a request being first communicated to military authorities, whichever occurs first. Counsel may be assigned for the limited purpose of representing the accused only during the pretrial confinement proceedings before charges are referred. If assignment is made for this limited purpose, the confinee shall be so informed. Unless otherwise provided by regulations of the Secretary concerned, a confinee does not have a right under this rule to have military counsel of the confinee's own selection.

(h) *Who may direct release from confinement.* Any commander of a confinee, an officer appointed under regulations of the Secretary concerned to conduct the review under R.C.M. 305(j) or (k), or, once charges have been referred, a military judge detailed to the court-martial to which the charges against the accused have been referred, may direct release from pretrial confinement. For purposes of this subsection (R.C.M. 305(h)), “any commander” includes the immediate or higher commander of the confinee and the commander of the installation on which the confinement facility is located.

(i) *Notification and action by commander.*

(1) *Report.* Unless the commander of the confinee ordered the pretrial confinement, the commissioned, warrant, noncommissioned, or petty officer into whose charge the confinee was committed shall, within 24 hours after that commitment, cause a report to be made to the commander that shall contain the name of the confinee, the offenses charged against the confinee, and the name of the person who ordered or authorized confinement.

(2) *Action by commander.*

(A) *Decision.* Not later than 72 hours after the commander’s ordering of a confinee into pretrial confinement or, after receipt of a report that a member of the commander’s unit or organization has been confined, whichever situation is applicable, the commander shall decide whether pretrial confinement will continue. A commander’s compliance with this paragraph (R.C.M. 305(i)(2)) may also satisfy the 48-hour probable cause determination of R.C.M. 305(j)(1), provided the commander is a neutral and detached officer and acts within 48 hours of the imposition of confinement under military control. Nothing in R.C.M. 305(d), this subparagraph (R.C.M. 305(i)(2)(A)), or R.C.M. (j)(1) prevents a neutral and detached

commander from completing the 48-hour probable cause determination and the 72-hour commander's decision immediately after an accused is ordered into pretrial confinement.

(B) *Requirements for confinement.* The commander shall direct the confinee's release from pretrial confinement unless the commander believes upon probable cause, that is, upon reasonable grounds, that:

- (i) An offense triable by a court-martial has been committed;
- (ii) The confinee committed it;
- (iii) Confinement is necessary because it is foreseeable that:
 - (a) The confinee will not appear at trial, pretrial hearing, or preliminary hearing, or
 - (b) The confinee will engage in serious criminal misconduct; and
 - (iv) Less severe forms of restraint are inadequate.

Serious criminal misconduct includes intimidation of witnesses or other obstruction of justice, serious injury of others, or other offenses which pose a serious threat to the safety of the community or to the effectiveness, morale, discipline, readiness, or safety of the command, or to the national security of the United States. As used in this rule, "national security" means the national defense and foreign relations of the United States and specifically includes: a military or defense advantage over any foreign nation or group of nations; a favorable foreign relations position; or a defense posture capable of successfully resisting hostile or destructive action from within or without, overt or covert.

(C) *72-hour memorandum.* If continued pretrial confinement is approved, the commander shall prepare a written memorandum that states the reasons for the conclusion that the requirements for confinement in R.C.M. 305(i)(2)(B) have been met. This memorandum may

include hearsay and may incorporate by reference other documents, such as witness statements, investigative reports, or official records. This memorandum shall be forwarded to the 7-day reviewing officer under R.C.M. 305(j)(2). If such a memorandum was prepared by the commander before ordering confinement, a second memorandum need not be prepared; however, additional information may be added to the memorandum at any time.

(j) Procedures for review of pretrial confinement.

(1) *48-hour probable cause determination.* Review of the adequacy of probable cause to continue pretrial confinement shall be made by a neutral and detached officer within 48 hours of imposition of confinement under military control. If the confinee is apprehended by civilian authorities and remains in civilian custody at the request of military authorities, reasonable efforts will be made to bring the confinee under military control in a timely fashion.

(2) *7-day review of pretrial confinement.* Within 7 days of the imposition of confinement, a neutral and detached officer appointed in accordance with regulations prescribed by the Secretary concerned shall review the probable cause determination and necessity for continued pretrial confinement. In calculating the number of days of confinement for purposes of this rule, the initial date of confinement under military control shall count as one day and the date of the review shall also count as one day.

(A) Nature of the 7-day review.

(i) *Matters considered.* The review under this clause (R.C.M. 305(j)(2)(A)(i)) shall include a review of the memorandum submitted by the confinee's commander under R.C.M. 305(i)(2)(C). Additional written matters may be considered, including any submitted by the confinee. The confinee and the confinee's counsel, if any, shall be allowed to appear before the 7-day reviewing officer and make a statement, if practicable. A

representative of the command may also appear before the reviewing officer to make a statement.

(ii) *Rules of evidence.* Except for Mil. R. Evid., Section V (Privileges) and Mil. R. Evid. 302 and 305, the Military Rules of Evidence shall not apply to the matters considered.

(iii) *Standard of proof.* The requirements for confinement under R.C.M. 305(h)(2)(B) must be proved by a preponderance of the evidence.

(iv) *Victim's right to be reasonably heard.* A victim of an alleged offense committed by the confinee has the right to reasonable, accurate, and timely notice of the 7-day review; the right to confer with the representative of the command and counsel for the Government, if any; and the right to be reasonably heard during the review. However, the hearing may not be unduly delayed for this purpose. The right to be heard under this rule includes the right to be heard through counsel and the right to be reasonably protected from the confinee during the 7-day review. Notice of these rights shall be given to the victim, or victim's counsel, if any, in accordance with regulations of the Secretary concerned

(B) *Extension of time limit.* The 7-day reviewing officer may, for good cause, extend the time limit for completion of the review to 10 days after the imposition of pretrial confinement.

(C) *Action by 7-day reviewing officer.* Upon completion of review, the reviewing officer shall approve continued confinement or order immediate release. If the reviewing officer orders immediate release, a victim of an alleged offense committed by the confinee has the right to reasonable, accurate, and timely notice of the release, unless such notice may endanger the safety of any person.

(D) *Memorandum.* The 7-day reviewing officer's conclusions, including the factual findings on which they are based, shall be set forth in a written memorandum. The memorandum shall also state whether the victim was represented by counsel, whether the victim was notified of the review, was given the opportunity to confer with the representative of the command or counsel for the Government and was given a reasonable opportunity to be heard. A copy of the memorandum and all documents considered by the 7-day reviewing officer shall be maintained in accordance with regulations prescribed by the Secretary concerned and provided to the accused or the Government on request.

(E) *Reconsideration of approval of continued confinement.* The 7-day reviewing officer shall upon request, and after notice to the parties, reconsider the decision to confine the confinee based upon any significant information not previously considered.

(k) *Review by military judge.* Once the charges for which the accused has been confined are referred to trial, or in a pre-referral proceeding conducted in accordance with R.C.M. 309, the military judge shall review the propriety of pretrial confinement upon motion for appropriate relief.

(1) *Release.* The military judge shall order release from pretrial confinement only if:

(A) The 7-day reviewing officer's decision was an abuse of discretion, and there is not sufficient information presented to the military judge justifying continuation of pretrial confinement under R.C.M. 305(i)(2)(B);

(B) Information not presented to the 7-day reviewing officer establishes that the confinee should be released under R.C.M. 305(i)(2)(B); or

(C) The provisions of R.C.M. 305(j)(1) or (2) have not been complied with and information presented to the military judge does not establish sufficient grounds for continued confinement under R.C.M. 305(i)(2)(B).

(2) *Credit.* Upon sentencing, the military judge shall order administrative credit under R.C.M. 305(l) for any pretrial confinement served as a result of an abuse of discretion or failure to comply with the provisions of R.C.M. 305(g), (i), or (j).

(l) *Remedy.* The remedy for noncompliance with R.C.M. 305(g), (i), (j), or (k) shall be an administrative credit against the sentence adjudged for any confinement served as the result of such noncompliance. Such credit shall be computed at the rate of 1 day credit for each day of confinement served as a result of such noncompliance. The military judge may order additional credit for each day of pretrial confinement that involves an abuse of discretion or unusually harsh circumstances. This credit is to be applied in addition to any other credit to which the accused may be entitled as a result of pretrial confinement served. This credit shall be applied first against any confinement adjudged. If no confinement is adjudged, or if the confinement adjudged is insufficient to offset all the credit to which the accused is entitled, the credit shall be applied against hard labor without confinement using the conversion formula under R.C.M. 1003(b)(6), restriction, fine, and forfeiture of pay, in that order. For purposes of R.C.M. 305(l), 1 day of confinement shall be equal to 1 day of total forfeiture or a like amount of fine. The credit shall not be applied against any other form of punishment.

(m) *Confinement after release.* No person whose release from pretrial confinement has been directed by a person authorized in R.C.M. 305(h) may be confined again before completion of trial except upon discovery, after the order of release, of evidence or of misconduct which, either

alone or in conjunction with all other available evidence, meets the criteria for confinement under R.C.M. 305(i)(2)(B)..

(n) Exceptions.

(1) *Operational necessity.* The Secretary of Defense may suspend application of R.C.M. 305(e)(3), (e)(4), (g), (i)(2)(A) or (C), or (j) to specific units or in specified areas when operational requirements of such units or in such areas would make application of such provisions impracticable.

(2) *At sea.* R.C.M. 305(e)(3), (e)(4), (g), (i)(2)(C), and (j) shall not apply in the case of a person on board a vessel at sea. In such situations, confinement on board the vessel at sea may continue only until the person can be transferred to a confinement facility ashore. Such transfer shall be accomplished at the earliest opportunity permitted by the operational requirements and mission of the vessel. Upon such transfer, the memorandum required by R.C.M. 305(i)(2)(C) shall be transmitted to the reviewing officer under R.C.M. 305(j) and shall include an explanation of any delay in the transfer.

(o) *Notice to victim of escaped confinee.* Reasonable, accurate, and timely notice of the escape of the prisoner shall be provided to the victim of an alleged offense committed by the confinee for which the confinee has been placed in pretrial confinement or such victim's counsel, if any, unless such notice may endanger the safety of any person."

(n) The title of R.C.M. 306 is amended to read as follows:

"Rule 306. Initial disposition of offenses over which special trial counsel does not exercise authority".

(o) R.C.M. 306(a) is amended to read as follows

"(a) Who may dispose of offenses.

(1) Except for offenses over which a special trial counsel has exercised authority and has not deferred, each commander has discretion to dispose of offenses by members of that command in accordance with this rule.

(2) Ordinarily the immediate commander of a person accused or suspected of committing offenses over which a special trial counsel has not exercised authority or has deferred initially determines how to dispose of those offenses. A superior commander may withhold the authority to dispose of offenses in individual cases, types of cases, or generally. A superior commander may not limit the discretion of a subordinate commander to act on cases over which authority has not been withheld.”

(p) R.C.M. 306(c) is amended to read as follows:

“(c) *Disposition of offenses.* Within the limits of the commander’s authority and subject to R.C.M. 306A, a commander may take the actions set forth in this subsection (R.C.M. 306(c)) to initially dispose of a charge or suspected offense.

(1) *No action.* A commander may decide to take no action.

(2) *Administrative action.* A commander may take or initiate administrative action, in addition to or instead of other action taken under this rule, subject to regulations of the Secretary concerned.

(3) *Nonjudicial punishment.* A commander may consider the matter pursuant to Article 15, nonjudicial punishment. *See Part V.*

(4) *Disposition of charges.* Charges may be disposed of in accordance with R.C.M. 401.

(5) *Forwarding for disposition.* A commander may forward a report of suspected offenses or charges to a superior or subordinate authority for disposition.”

(q) R.C.M. 306(e)(1) is amended to read as follows:

“(1) For purposes of this subsection (R.C.M. 306(e)), a “sex-related offense” means any allegation of a violation of Article 120, 120b, 120c, or 130, or any attempt thereof under Article 80, occurring on or before December 27, 2023.”

(r) A new R.C.M. 306A is inserted immediately after R.C.M. 306 to read as follows:

“Rule 306A. Initial disposition of offenses over which a special trial counsel exercises authority

(a) *Disposition of offenses that are not the subject of preferred charges.* Once a special trial counsel has exercised authority over an offense, only a special trial counsel may dispose of that offense, unless a special trial counsel defers the offense. For each offense over which a special trial counsel has exercised authority that is not the subject of a preferred charge, a special trial counsel shall:

(1) Prefer, or cause to be preferred, a charge; or

(2) Defer the offense by electing not to prefer a charge. If a special trial counsel defers the offense, the special trial counsel shall promptly forward the offense to a commander or convening authority for disposition, and the commander or convening authority shall dispose of the offense pursuant to R.C.M. 306.

(b) *Disposition of a preferred specification.* A special trial counsel shall dispose of each preferred specification in accordance with R.C.M. 401A.

(c) *National security matters.* If a commander believes trial would be detrimental to the prosecution of a war or harmful to national security, the matter shall be forwarded to the Secretary concerned for action.

(d) *Sex-related offenses.*

(1) For purposes of this subsection (R.C.M. 306A(d)), “sex-related offense” means any allegation of a violation of Article 120, 120b, 120c, or 130, or any attempt thereof under Article 80.

(2) Under such regulations as the Secretary concerned may prescribe, for alleged sex-related offenses committed in the United States, the victim of the sex-related offense shall be provided an opportunity to express views as to whether the offense should be prosecuted by court-martial or in a civilian court with jurisdiction over the offense. A special trial counsel shall consider the victim’s preference for jurisdiction, if available, prior to making an initial disposition decision. For purposes of this rule, “victim” is defined as an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an alleged sex-related offense as defined in R.C.M. 306A(d)(1).

(3) Under such regulations as the Secretary concerned may prescribe, if the victim of an alleged sex-related offense expresses a preference for prosecution of the offense in a civilian court, a special trial counsel shall ensure that the civilian authority with jurisdiction over the offense is notified of the victim’s preference for civilian prosecution. If a special trial counsel learns of any decision by the civilian authority to prosecute or not prosecute the offense in civilian court, the special trial counsel shall ensure the victim, or victim’s counsel, if any, is notified.”

(s) R.C.M. 307(a) is amended to read as follows:

“(a) *In general.* In accordance with R.C.M. 307(b), preferral is the act by which a person subject to the UCMJ formally accuses another person subject to the UCMJ of an offense. Any person subject to the UCMJ may prefer charges.”

(t) R.C.M. 308 is revised to read as follows:

“Rule 308. Notification to accused of charges and required disclosures

(a) *Immediate commander.* The immediate commander of the accused shall cause the accused to be informed of the charges preferred against the accused, and the name of the person who preferred the charges and of any person who ordered the charges to be preferred, if known, as soon as practicable.

(b) *Commanders at higher echelons.* When the accused has not been informed of the charges, commanders at higher echelons to whom the preferred charges are forwarded shall cause the accused to be informed of the matters required under R.C.M. 308(a) as soon as practicable.

(c) *Disclosures generally.* Except as otherwise provided in R.C.M. 308(d) and as soon as practicable after notification to the accused of preferred charges, counsel for the Government shall provide the defense with copies of the charges and any books, papers, documents, data, photographs, or tangible objects that accompanied the charge or charges when preferred. If extraordinary circumstances make it impracticable to provide copies, counsel for the Government shall permit the defense to inspect these items.

(d) *Information not subject to disclosure.*

(1) *Military Rules of Evidence.* Nothing in this rule shall be construed to require the disclosure of information protected from disclosure by the Military Rules of Evidence.

(2) *Work Product.* Nothing in this rule shall require the disclosure or production of notes, memoranda, or similar working papers prepared by counsel or counsel’s assistants and representatives.

(3) *Contraband.* If items covered by R.C.M. 308(c) are contraband, the disclosure required under this rule is a reasonable opportunity to inspect said contraband prior to the preliminary hearing.

(4) *Privilege*. If items covered by R.C.M. 308(c) are privileged, classified, or otherwise protected under Section V of Part III, the Military Rules of Evidence, no disclosure of those items is required under this rule. However, counsel for the Government may disclose privileged, classified, or otherwise protected information covered by R.C.M. 308(a) if authorized by the holder of the privilege or, in the case of Mil. R. Evid. 505 or 506, if authorized by a competent authority.

(5) *Protective order if privileged information is disclosed*. If the Government agrees to disclose to the accused information to which the protections afforded by Section V of the Military Rules of Evidence may apply, the convening authority, or other person designated by regulation of the Secretary concerned, may enter an appropriate protective order, in writing, to guard against the compromise of information disclosed to the accused. The terms of any such protective order may include prohibiting the disclosure of the information except as authorized by the authority issuing the protective order, as well as those terms specified by Mil. R. Evid. 505(g)(2)–(6) or 506(g)(2)–(5). (e) *Remedy*. The sole remedy for violation of this rule is a continuance or recess of sufficient length to permit the accused to adequately prepare a defense, and no relief shall be granted upon a failure to comply with this rule unless the accused demonstrates that the accused has been hindered in the preparation of a defense.”

(u) R.C.M. 309(a)(2) is amended to read as follows:

“(2) The matters that may be considered and ruled upon by a military judge under this rule are limited to those matters specified in R.C.M. 309(b).”

(v) R.C.M. 309(b)(3) is amended to read as follows:

“(3) *Requests for relief from subpoena or other process*. A person in receipt of a pre-referral investigative subpoena under R.C.M. 703(g)(3)(C), a victim named in a specification

whose personal and confidential information has been subpoenaed under R.C.M.

703(g)(3)(C)(ii), a service provider in receipt of a warrant or court order to disclose information about wire or electronic communications under R.C.M. 703A(a), or a person ordered to sit for a deposition under R.C.M. 702(b)(2) may request relief on grounds that compliance with the subpoena, warrant, or order is unreasonable, oppressive, or prohibited by law. The military judge shall review the request and shall either order the person or service provider to comply with the subpoena, warrant, or order, or modify or quash the subpoena, warrant, or order, as appropriate. In a proceeding under this paragraph, the United States shall be represented by an authorized counsel for the Government.”

(w) R.C.M. 309(b)(6) is amended to read as follows:

“(6) *Pretrial confinement of an accused.* After action by the 7-day reviewing officer under R.C.M. 305(j)(2)(C), a military judge may, upon application of an accused for appropriate relief, review the propriety of pretrial confinement. A military judge may order release from pretrial confinement under the provisions of R.C.M. 305(k)(1).”

(x) A new R.C.M. 309(b)(10) is inserted immediately after (b)(9) to read as follows:

“(10) *Pre-referral depositions.* A military judge may, upon application by a party, consider whether to order a pre-referral deposition under R.C.M. 702(c)(2).”

(y) R.C.M. 309(e) is amended to read as follows:

“(e) *Record.* A separate record of any proceeding under this rule shall be prepared and forwarded to the convening authority, special trial counsel, or any combination thereof, with authority to dispose of the charges or offenses in the case. If charges are referred to trial in the case, such record shall be included in the record of trial.”

(z) R.C.M. 401(a) is revised to read as follows:

“(a) *Who may dispose of charges.* Only persons authorized to convene courts-martial or to administer nonjudicial punishment under Article 15 may dispose of charges, except for those charges over which a special trial counsel has exercised authority and which must be disposed of in accordance with R.C.M. 401A. A superior competent authority may withhold the authority of a subordinate to dispose of charges in individual cases, types of cases, or generally.”

(aa) A new R.C.M. 401A is inserted immediately after R.C.M. 401 to read as follows:

“Rule 401A. Disposition of charges over which a special trial counsel exercises authority and has not deferred

(a) *Who may dispose of preferred specifications.* Regardless of who preferred a specification, only a special trial counsel may dispose of a specification alleging a covered offense or another offense over which a special trial counsel has exercised authority and has not deferred. A superior competent authority may withhold the authority of a subordinate special trial counsel to dispose of offenses charged in individual cases, types of cases, or generally.

(b) *Prompt determination.* Special trial counsel shall promptly determine what disposition will be made in the interest of justice and discipline.

(c) *Disposition of preferred specifications.*

(1) *Referral.* For those offenses over which a special trial counsel has exercised authority and not deferred, a special trial counsel may refer a charge and any specification thereunder to a special or general court-martial. If a preliminary hearing in accordance with Article 32 and R.C.M. 405 is required, a special trial counsel shall request a hearing officer and a hearing officer shall be provided by the convening authority.

(2) *Dismissal.* For those offenses over which a special trial counsel has exercised authority and not deferred, a special trial counsel may dismiss any charge or specification

thereunder. A dismissal may be accompanied by a deferral as defined in this rule. Further disposition by a special trial counsel in accordance with this rule or by a convening authority pursuant to RCM 306(c) is not barred.

(3) *Deferral.*

(A) *Pre-referral.* A special trial counsel may defer a charged offense by electing not to refer the charged offense to a special or general court-martial. Upon such a determination, the special trial counsel shall promptly forward the matter to the commander or convening authority for disposition. The commander or convening authority shall dispose of the offense pursuant to R.C.M. 306 or the charged offense pursuant to R.C.M. 401, as applicable. The commander or convening authority may dismiss a charge preferred by a special trial counsel. However, a convening authority may not refer a charge alleging a covered offense to a special or general court-martial.

(B) *Post-referral.* After referral, a charge referred to a general or special court-martial by a special trial counsel must be withdrawn before the offense alleged by that charge may be deferred.”

(bb) R.C.M. 402 is amended to read as follows:

“Rule 402. Action by commander not authorized to convene courts-martial

Except for covered offenses and other charges over which a special trial counsel has exercised authority and has not deferred, when in receipt of charges, a commander authorized to administer nonjudicial punishment but not authorized to convene courts-martial may:

- (1) Dismiss any charge; or
- (2) Forward any charge to a superior commander for disposition.”

(cc) R.C.M. 403 is amended to read as follows:

“Rule 403. Action by commander exercising summary court-martial jurisdiction.

(a) *Recording receipt.* Immediately upon receipt of sworn charges, an officer exercising summary court-martial jurisdiction over the command shall cause the hour and date of receipt to be entered on the charge sheet. After recording receipt of charges over which a special trial counsel has exercised authority and has not deferred, the charge sheet shall be returned to the special trial counsel.

(b) *Disposition.* Except for covered offenses and other charges over which a special trial counsel has exercised authority and has not deferred, when in receipt of charges, a commander exercising summary court-martial jurisdiction may:

- (1) Dismiss any charge;
- (2) Forward any charge (or, after dismissing a charge, the matter) to a subordinate commander for disposition;
- (3) Forward any charge to a superior commander for disposition;
- (4) Subject to R.C.M. 601(d) and 1301(c), refer any charge to a summary court-martial for trial; or
- (5) Unless otherwise prescribed by the Secretary concerned, direct a preliminary hearing under R.C.M. 405, and, if appropriate, forward the report of preliminary hearing with the charges to a superior commander for disposition.”

(dd) R.C.M. 404 is amended to read as follows:**“Rule 404. Action by commander exercising special court-martial jurisdiction**

Except for covered offenses and other charges over which a special trial counsel has exercised authority and has not deferred, when in receipt of charges, a commander exercising special court-martial jurisdiction may:

- (1) Dismiss any charge;
- (2) Forward any charge (or, after dismissing a charge, the matter) to a subordinate commander for disposition;
- (3) Forward any charge to a superior commander for disposition;
- (4) Subject to R.C.M. 201(f)(2)(D) and (E), 601(d), and 1301(c), refer any charge to a summary court-martial or to a special court-martial for trial; or
- (5) Unless otherwise prescribed by the Secretary concerned, direct a preliminary hearing under R.C.M. 405, and, if appropriate, forward the report of preliminary hearing with the charges to a superior commander for disposition.”

(ee) R.C.M. 404A is deleted.

(ff) R.C.M. 405 is amended to read as follows:

“Rule 405. Preliminary hearing.

(a) *In general.* Except as provided in R.C.M. 405(n), no charge or specification may be referred to a general court-martial for trial until completion of a preliminary hearing in substantial compliance with this rule. The issues for determination at a preliminary hearing are limited to the following: whether each specification alleges an offense; whether there is probable cause to believe that the accused committed the offense or offenses charged; whether the convening authority has court-martial jurisdiction over the accused and over the offense; and to recommend the disposition that should be made of the case. Failure to comply with this rule shall have no effect on the disposition of any charge if the charge is not referred to a general court-martial.

(b) *Earlier preliminary hearing.* If a preliminary hearing on the subject matter of an offense has been conducted before the accused is charged with an offense, and the accused was present at the

preliminary hearing and afforded the rights to counsel, cross-examination, and presentation of evidence required by this rule, no further preliminary hearing is required.

(c) Who may direct a preliminary hearing.

(1) Subject to R.C.M. 405(c)(2), unless prohibited by regulations of the Secretary concerned, a preliminary hearing may be directed under this rule by any court-martial convening authority. That authority may also give procedural instructions not inconsistent with these rules.

(2) For charges and specifications over which a special trial counsel has exercised authority, the special trial counsel shall determine whether a preliminary hearing is required. If a special trial counsel determines that a hearing is required, the special trial counsel shall request that a convening authority provide a preliminary hearing officer. Upon such a request, the convening authority shall provide a preliminary hearing officer and direct a preliminary hearing in accordance with this rule. If a special trial counsel determines a previous preliminary hearing is required to be reopened, the convening authority shall direct the preliminary hearing to be reopened.

(d) Disclosures after direction of a preliminary hearing.

(1) As soon as practicable but no later than five days after direction of an Article 32 preliminary hearing, counsel for the Government shall provide the defense with copies of, or, if impracticable, permit the defense to inspect:

(A) the order directing the Article 32 preliminary hearing pursuant to this rule (R.C.M. 405);

(B) statements, within the control of military authorities, of witnesses that counsel for the Government intends to call at the preliminary hearing;

(C) evidence counsel for the Government intends to present at the preliminary hearing; and

(D) any matters provided to the convening authority when deciding to direct the preliminary hearing.

(2) *Contraband*. If items covered by R.C.M. 405(d)(1) are contraband, the disclosure required under this rule is a reasonable opportunity to inspect said contraband prior to the preliminary hearing.

(3) *Privilege*. If items covered by R.C.M. 405(d)(1) are privileged, classified, or otherwise protected under Section V of Part III, the Military Rules of Evidence, no disclosure of those items is required under this rule. However, counsel for the Government may disclose privileged, classified, or otherwise protected information covered by R.C.M. 405(d)(1) if authorized by the holder of the privilege, or, in the case of Mil. R. Evid. 505 or 506, if authorized by a competent authority.

(4) *Protective order if privileged information is disclosed*. If the Government agrees to disclose to the accused information to which the protections afforded by Section V of Part III may apply, the convening authority, or other person designated by regulation of the Secretary concerned, may enter an appropriate protective order, in writing, to guard against the compromise of information disclosed to the accused. The terms of any such protective order may include prohibiting the disclosure of the information except as authorized by the authority issuing the protective order, as well as those terms specified by Mil. R. Evid. 505(g)(2)–(6) or 506(g)(2)–(5).

(e) *Personnel*.

(1) Preliminary hearing officer.

(A) The convening authority directing the preliminary hearing shall detail an impartial judge advocate, not the accuser, who is certified under Article 27(b)(2) to conduct the hearing. When it is impracticable to appoint a judge advocate certified under Article 27(b)(2) due to exceptional circumstances:

- (i) The convening authority may detail an impartial commissioned officer as the preliminary hearing officer, and
- (ii) An impartial judge advocate certified under Article 27(b)(2) shall be available to provide legal advice to the detailed preliminary hearing officer.

(B) Whenever practicable, the preliminary hearing officer shall be equal or senior in grade to the military counsel detailed to represent the accused and the Government at the preliminary hearing.

(C) The Secretary concerned may prescribe additional limitations on the detailing of preliminary hearing officers.

(D) The preliminary hearing officer shall not depart from an impartial role and become an advocate for either side. The preliminary hearing officer is disqualified to act later in the same case in any other capacity.

(2) Counsel for the Government.

(A) Subject to R.C.M. 405(e)(2)(B), a judge advocate, not the accuser, shall serve as counsel to represent the Government.

(B) For preliminary hearings requested by a special trial counsel, the special trial counsel shall detail counsel for the Government consistent with regulations prescribed by the Secretary concerned. Any determination by a special trial counsel to prefer or refer charges shall not act to disqualify that special trial counsel as an accuser.

(3) *Defense counsel.*

(A) *Detailed counsel.* Military counsel certified in accordance with Article 27(b) shall be detailed to represent the accused.

(B) *Individual military counsel.* The accused may request to be represented by individual military counsel. Such requests shall be acted on in accordance with R.C.M. 506(b).

(C) *Civilian counsel.* The accused may be represented by civilian counsel at no expense to the Government. Upon request, the accused is entitled to a reasonable time to obtain civilian counsel and to have such counsel present for the preliminary hearing. However, the preliminary hearing shall not be unduly delayed for this purpose. Representation by civilian counsel shall not limit the rights to military counsel under R.C.M. 405(e)(3)(A) or (B).

(4) *Others.* The convening authority who directed the preliminary hearing may also detail or request an appropriate authority to detail a reporter, an interpreter, or both.

(f) *Scope of preliminary hearing.*

(1) The preliminary hearing officer shall limit the inquiry to the examination of evidence, including witnesses, relevant to the issues for determination under R.C.M. 405(a).

(2) If evidence adduced during the preliminary hearing indicates that the accused committed any uncharged offense, the preliminary hearing officer may examine evidence and hear witnesses presented by the parties relating to the subject matter of such offense and make the determination specified in R.C.M. 405(a) regarding such offense without the accused first having been charged with the offense. The rights of the accused under R.C.M. 405(g), and, where it would not cause undue delay to the proceedings, the procedure applicable for production of witnesses and other evidence under R.C.M. 405(i), are the same with regard to both charged and uncharged offenses. When considering uncharged offenses identified during

the preliminary hearing, the preliminary hearing officers shall inform the accused of the general nature of each offense considered and otherwise afford the accused the same opportunity for representation, cross-examination, and presentation afforded during the preliminary hearing of any charged offense.

(3) If evidence adduced during the preliminary hearing indicates that the accused committed any uncharged covered offense and the preliminary hearing was not requested by special trial counsel, the preliminary hearing officer shall provide prompt notice to the convening authority and a special trial counsel and shall submit a copy of the preliminary hearing report to a special trial counsel.

(g) *Rights of the accused.* At any preliminary hearing under this rule the accused shall have the right to:

- (1) Be advised of the charges and uncharged misconduct under consideration;
- (2) Be represented by counsel;
- (3) Be informed of the purpose of the preliminary hearing;
- (4) Be informed of the right against self-incrimination under Article 31;
- (5) In accordance with the terms of R.C.M. 405(k)(4), be present throughout the taking of evidence;
- (6) Cross-examine witnesses on matters relevant to the issues for determination under R.C.M. 405(a);
- (7) Present matters relevant to the issues for determination under R.C.M. 405(a); and
- (8) Make a sworn or unsworn statement relevant to the issues for determination under R.C.M. 405(a).

(h) *Notice to and presence of victim.*

(1) For the purposes of this rule, a “victim” is an individual who is alleged to have suffered a direct physical, emotional, or pecuniary harm as a result of the commission of an offense under the UCMJ.

(2) A victim of an offense under the UCMJ or the victim’s counsel, if any, shall receive reasonable, accurate, and timely notice of a preliminary hearing relating to the alleged offense and a reasonable opportunity to confer with counsel for the Government.

(3) A victim has the right not to be excluded from any public proceeding of the preliminary hearing, except to the extent a similarly situated victim would be excluded at trial.

(i) Notice, Production of Witnesses, and Production of Other Evidence.

(1) *Notice.* Prior to any preliminary hearing under this rule, the parties shall, in accordance with timelines set by the preliminary hearing officer, provide to the preliminary hearing officer and the opposing party the following notices:

(A) Notice of the name and contact information for each witness the party intends to call at the preliminary hearing;

(B) Notice of any other evidence that the party intends to offer at the preliminary hearing; and

(C) Notice of any additional information the party intends to submit under R.C.M. 405(l).

(2) Production of Witnesses.

(A) *Military Witnesses.*

(i) Prior to the preliminary hearing, defense counsel shall provide to counsel for the Government the names of proposed military witnesses whom the accused requests that the Government produce to testify at the preliminary hearing, and the requested

form of the testimony, in accordance with the timeline established by the preliminary hearing officer. Counsel for the Government shall respond that either (1) the Government agrees that the witness' testimony is relevant, not cumulative, and necessary to a determination of the issues under R.C.M. 405(a) and will seek to secure the witness' testimony for the hearing; or (2) the Government objects to the proposed defense witness on the grounds that the testimony would be irrelevant, cumulative, or unnecessary to a determination of the issues under R.C.M. 405(a).

(ii) If the Government objects to the proposed defense witness, defense counsel may request that the preliminary hearing officer determine whether the witness is relevant, not cumulative, and necessary to a determination of the issues under R.C.M. 405(a).

(iii) If the Government does not object to the proposed defense military witness or the preliminary hearing officer determines that the military witness is relevant, not cumulative, and necessary, counsel for the Government shall request that the commanding officer of the proposed military witness make that person available to provide testimony. The commanding officer shall determine whether the individual is available, and if so, whether the witness will testify in person, by video teleconference, by telephone, or by similar means of remote testimony, based on operational necessity or mission requirements. If the commanding officer determines that the military witness is available, counsel for the Government shall make arrangements for that individual's testimony. The commanding officer's determination of unavailability due to operational necessity or mission requirements is final.

(iv) A victim who is alleged to have suffered a direct physical, emotional, or pecuniary harm as a result of the matters set forth in a charge or specification under consideration and is named in one of the specifications under consideration shall not be required to testify at a preliminary hearing.

(B) *Civilian Witnesses.*

(i) Defense counsel shall provide to counsel for the Government the names of proposed civilian witnesses whom the accused requests that the Government produce to testify at the preliminary hearing, and the requested form of the testimony, in accordance with the timeline established by the preliminary hearing officer. Counsel for the Government shall respond that either (1) the Government agrees that the witness' testimony is relevant, not cumulative, and necessary to a determination of the issues under R.C.M. 405(a) and will seek to secure the witness' testimony for the hearing; or (2) the Government objects to the proposed defense witness on the grounds that the testimony would be irrelevant, cumulative, or unnecessary to a determination of the issues under R.C.M. 405(a).

(ii) If the Government objects to the proposed defense witness, defense counsel may request that the preliminary hearing officer determine whether the witness is relevant, not cumulative, and necessary to a determination of the issues under R.C.M. 405(a).

(iii) If the Government does not object to the proposed civilian witness or the preliminary hearing officer determines that the civilian witness' testimony is relevant, not cumulative, and necessary, counsel for the Government shall invite the civilian witness to provide testimony and, if the individual agrees, shall make arrangements for the witness's testimony. If expense to the Government is to be incurred, the convening authority who directed the preliminary hearing, or the convening authority's delegate, shall determine whether the witness testifies in person, by video teleconference, by telephone, or by similar means of remote testimony.

(3) *Production of other evidence.*

(A) *Evidence under the control of the Government.*

(i) Prior to the preliminary hearing, defense counsel shall provide to counsel for the Government a list of evidence under the control of the Government the accused requests the Government produce to the defense for introduction at the preliminary hearing. The preliminary hearing officer may set a deadline by which defense requests must be received. Counsel for the Government shall respond that either (1) the Government agrees that the evidence is relevant, not cumulative, and necessary to a determination of the issues under R.C.M. 405(a) and shall make reasonable efforts to obtain the evidence; or (2) the Government objects to production of the evidence on the grounds that the evidence would be irrelevant, cumulative, or unnecessary to a determination of the issues under R.C.M. 405(a).

(ii) If the Government objects to the production of the evidence, defense counsel may request that the preliminary hearing officer determine whether the evidence should be produced. The preliminary hearing officer shall determine whether the evidence is relevant, not cumulative, and necessary to a determination of the issues under R.C.M. 405(a). If the preliminary hearing officer determines that the evidence shall be produced, counsel for the Government shall make reasonable efforts to obtain the evidence.

(iii) The preliminary hearing officer may not order the production of any privileged matters; however, when a party offers evidence that an opposing party claims is privileged, the preliminary hearing officer may rule on whether a privilege applies.

(B) Evidence not under the control of the Government.

(i) Evidence not under the control of the Government may be obtained through noncompulsory means or by a pre-referral investigative subpoena issued by a military judge under R.C.M. 309 or counsel for the Government in accordance with the process established by R.C.M. 703(g)(3)(C).

(ii) Prior to the preliminary hearing, defense counsel shall provide to counsel for the Government a list of evidence not under the control of the Government that the accused requests the Government obtain. The preliminary hearing officer may set a deadline by which defense requests must be received. Counsel for the Government shall respond that either (1) the Government agrees that the evidence is relevant, not cumulative, and necessary to a determination of the issues under R.C.M. 405(a) and shall issue a pre-referral investigative subpoena for the evidence; or (2) the Government objects to the production of the evidence on the grounds that the evidence would be irrelevant, cumulative, or unnecessary to a determination of the issues under R.C.M. 405(a).

(iii) If the Government objects to production of the evidence, defense counsel may request that the preliminary hearing officer determine whether the evidence should be produced. If the preliminary hearing officer determines that the evidence is relevant, not cumulative, and necessary to a determination of the issues under R.C.M. 405(a) and that the issuance of a pre-referral investigative subpoena would not cause undue delay to the preliminary hearing, the preliminary hearing officer shall direct counsel for the Government to seek a pre-referral investigative subpoena for the defense-requested evidence from a military judge in accordance with R.C.M. 309 or authorization from the general court-martial convening authority to issue an investigative subpoena. If counsel for the Government refuses or is unable to obtain an investigative subpoena, the counsel shall set forth the reasons why the investigative subpoena was not obtained in a written statement that shall be included in the preliminary hearing report under R.C.M. 405(m).

(iv) The preliminary hearing officer may not order the production of any privileged matters; however, when a party offers evidence that an opposing party claims is privileged, the preliminary hearing officer may rule on whether a privilege applies.

(j) Military Rules of Evidence.

(1) In general.

(A) Only the following Military Rules of Evidence apply to preliminary hearings:

(i) Mil. R. Evid. 301-303 and 305.

(ii) Mil. R. Evid. 412(a), except as provided in R.C.M. 405(j)(2).

(iii) Mil. R. Evid., Section V, Privileges, except that Mil. R. Evid. 505(f)-(h) and (j); 506(f)-(h), (j), (k), and (m); and 514(d)(6) shall not apply.

(B) In applying the rules to a preliminary hearing in accordance with R.C.M. 405(j)(1)(A), the term “military judge,” as used in such rules, means the preliminary hearing officer, who shall assume the military judge’s authority to exclude evidence from the preliminary hearing, and who shall, in discharging this duty, follow the procedures set forth in such rules.

Evidence offered in violation of the procedural requirements of the rules in R.C.M. 405(j)(1)(A) shall be excluded from the preliminary hearing, unless good cause is shown.

(2) Sex-offense cases.

(A) *Inadmissibility of certain evidence.* In a case of an alleged sexual offense, as defined under Mil. R. Evid. 412(d), evidence offered to prove that any alleged victim engaged in other sexual behavior or evidence offered to prove any alleged victim’s sexual predisposition is not admissible at a preliminary hearing unless—

(i) the evidence would be admissible at trial under Mil. R. Evid. 412(b)(1) or (2); and

(ii) the evidence is relevant, not cumulative, and is necessary to a determination of the issues under R.C.M. 405(a).

(B) *Initial procedure to determine admissibility.* A party intending to offer evidence under R.C.M. 405(j)(2)(A) shall, no later than five days before the preliminary hearing begins, submit a written motion specifically describing the evidence and stating why the evidence is admissible. The preliminary hearing officer may permit a different filing time, but any motion shall be filed prior to the beginning of the preliminary hearing. The moving party shall serve the motion on the opposing party, who shall have the opportunity to respond in writing. Counsel for the Government shall cause the motion and any written responses to be served on the victim, or victim's counsel, if any, or, when appropriate, the victim's guardian or representative. After reviewing the motion and any written responses, the preliminary hearing officer shall either—

(i) deny the motion on the grounds that the evidence does not meet the criteria specified in R.C.M. 405(j)(2)(A)(i) or (ii); or

(ii) conduct a hearing to determine the admissibility of the evidence.

(C) *Admissibility hearing.* If the preliminary hearing officer conducts a hearing to determine the admissibility of the evidence, the admissibility hearing shall be closed and should ordinarily be conducted at the end of the preliminary hearing, after all other evidence offered by the parties has been admitted. At the admissibility hearing, the parties may call witnesses and offer relevant evidence. The victim shall be afforded a reasonable opportunity to attend and be heard, to include being heard through counsel. If the preliminary hearing officer determines that the evidence should be admitted, the victim may directly petition the Court of Criminal Appeals for a writ of mandamus pursuant to Article 6b.

(D) *Sealing*. The motions, related papers, and the record of an admissibility hearing shall be sealed and remain under seal in accordance with R.C.M. 1113.

(k) *Preliminary hearing procedure*.

(1) *Generally*. The preliminary hearing shall begin with the preliminary hearing officer informing the accused of the accused's rights under R.C.M. 405(g). Counsel for the Government will then present evidence. Upon the conclusion of counsel for the Government's presentation of evidence, defense counsel may present matters. Both counsel for the Government and defense counsel shall be afforded an opportunity to cross-examine adverse witnesses. The preliminary hearing officer may also question witnesses called by the parties. If the preliminary hearing officer determines that additional evidence is necessary for a determination of the issues under R.C.M. 405(a), the preliminary hearing officer may provide the parties an opportunity to present additional testimony or evidence. Except as provided in R.C.M. 405(m)(2)(J), the preliminary hearing officer shall not consider evidence not presented at the preliminary hearing in making the determination under R.C.M. 405(a). The preliminary hearing officer shall not call witnesses *sua sponte*.

(2) *Presentation of evidence*.

(A) *Testimony*. Witness testimony may be provided in person, by video teleconference, by telephone, or by similar means of remote testimony. All testimony shall be taken under oath, except that the accused may make an unsworn statement. The preliminary hearing officer shall only consider testimony that is relevant to the issues for determination under R.C.M. 405(a).

(B) *Other evidence*. If relevant to the issues for determination under R.C.M. 405(a) and not cumulative, a preliminary hearing officer may consider other evidence offered by

either counsel for the Government or defense counsel, in addition to or in lieu of witness testimony, including statements, tangible evidence, or reproductions thereof, that the preliminary hearing officer determines is reliable. This other evidence need not be sworn.

(3) *Access by spectators.* Preliminary hearings are public proceedings and should remain open to the public whenever possible, whether conducted in person or via remote means. If there is an overriding interest that outweighs the value of an open preliminary hearing, the convening authority or the preliminary hearing officer may restrict or foreclose access by spectators to all or part of the proceedings. Any restriction or closure must be narrowly tailored to protect the overriding interest involved. Before ordering any restriction or closure, a convening authority or preliminary hearing officer must determine whether any reasonable alternatives to such restriction or closure exist, or if some lesser means can be used to protect the overriding interest in the case. The convening authority or preliminary hearing officer shall make specific findings of fact in writing that support the restriction or closure. The written findings of fact shall be included in the preliminary hearing report.

(4) *Presence of accused.* The accused shall be present for the preliminary hearing.

(A) *Remote presence of the accused.* The convening authority that directed the preliminary hearing may authorize the use of audio-visual technology between the parties and the preliminary hearing officer. In such circumstances, the “presence” requirement of the accused is met only when the accused has a defense counsel physically present at the accused’s location or when the accused consents to presence by remote means with the opportunity for confidential consultation with defense counsel during the proceeding. Such technology may include two or more remote sites as long as all parties can see and hear each other.

(B) The accused shall be considered to have waived the right to be present at the preliminary hearing if the accused:

- (i) After being notified of the time and place of the proceeding is voluntarily absent; or
- (ii) After being warned by the preliminary hearing officer that disruptive conduct will cause removal from the proceeding, persists in conduct which is such as to justify exclusion from the proceeding.

(5) *Recording of the preliminary hearing.* Counsel for the Government shall ensure that the preliminary hearing is recorded by a suitable recording device. A victim named in a specification under consideration may request access to, or a copy of, the recording of the proceedings. Upon request, counsel for the Government shall provide the requested access to, or a copy of, the recording or, at the Government's discretion, a transcript, to the victim or victim's counsel, if any, not later than a reasonable time following dismissal of the charges, unless charges are dismissed for the purpose of rereferral, or court-martial adjournment. This rule does not entitle the victim to classified information or sealed materials consistent with an order issued in accordance with R.C.M. 1113(a).

(6) *Recording and broadcasting prohibited.* Video and audio recording, broadcasting, and the taking of photographs—except as required in R.C.M. 405(k)(5)—are prohibited. The convening authority may, as a matter of discretion, permit contemporaneous closed-caption video or audio transmission to permit viewing or hearing by an accused removed under R.C.M. 405(k)(4) or by spectators when the facilities are inadequate to accommodate a reasonable number of spectators.

(7) *Objections.* Any objection alleging a failure to comply with this rule, other than an objection under R.C.M. 405(m), shall be made to the preliminary hearing officer promptly upon discovery of the alleged error. The preliminary hearing officer is not required to rule on any objection. An objection shall be noted in the preliminary hearing report if the person objecting so requests. The preliminary hearing officer may require a party to file any objection in writing.

(8) *Sealed exhibits and proceedings.* The preliminary hearing officer has the authority to order exhibits, recordings of proceedings, or other matters sealed as described in R.C.M. 1113.

(I) *Supplementary information.*

(1) No later than 24 hours from the closure of the preliminary hearing, counsel for the Government, defense counsel, and any victim named in a specification under consideration (or, if applicable, counsel for such a victim) may submit to the preliminary hearing officer, counsel for the Government, and defense counsel additional information that the submitter deems relevant to the disposition of the charges and specifications.

(2) Defense counsel may submit additional matters that rebut the submissions of counsel for the Government or any victim provided under R.C.M. 405(l)(1). Such matters must be provided to the preliminary hearing officer and to the counsel for the Government within 5 days of the closure of the preliminary hearing.

(3) The preliminary hearing officer shall examine all supplementary information submitted under R.C.M. 405(l) and shall seal, in accordance with R.C.M. 1113, any matters the preliminary hearing officer deems privileged or otherwise not subject to disclosure.

(A) The preliminary hearing officer shall provide a written summary and an analysis of the supplementary information submitted under R.C.M. 405(l) that is not sealed and

is relevant to disposition for inclusion in the report to the convening authority or special trial counsel, as applicable, under R.C.M. 405(m).

(B) If the preliminary hearing officer seals any supplementary information submitted under R.C.M. 405(l), the preliminary hearing officer shall provide an analysis of those materials. The analysis of the sealed materials shall be sealed. Additionally, the preliminary hearing officer shall generally describe those matters and detail the basis for sealing them in a separate cover sheet. This cover sheet shall accompany the sealed matters and shall not contain privileged information or be sealed.

(4) The supplementary information and any summary and analysis provided by the preliminary hearing officer, and any sealed matters and cover sheets, as applicable, shall be forwarded to the convening authority or special trial counsel, as applicable, for consideration in making a disposition determination.

(5) Submissions under R.C.M. 405(l) shall be maintained as an attachment to the preliminary hearing report provided under R.C.M. 405(m).

(m) *Preliminary hearing report.*

(1) *In general.* The preliminary hearing officer shall make a timely written report of the preliminary hearing to the convening authority or, for hearings requested by a special trial counsel, to the special trial counsel. This report is advisory and does not bind the staff judge advocate, convening authority, or special trial counsel, as applicable.

(2) *Contents.* The preliminary hearing report shall include:

(A) A statement of names and organizations or addresses of counsel for the Government and defense counsel and, if applicable, a statement of why either counsel was not present at any time during the proceedings;

- (B) The recording of the preliminary hearing under R.C.M. 405(k)(5);
- (C) For each specification, the preliminary hearing officer's reasoning and conclusions with respect to the issues for determination under R.C.M. 405(a), including a summary of relevant witness testimony and documentary evidence presented at the hearing and any observations concerning the testimony of witnesses and the availability and admissibility of evidence at trial;
- (D) If applicable, a statement that an essential witness may not be available for trial;
- (E) An explanation of any delays in the preliminary hearing;
- (F) A notation if counsel for the Government refused to issue a pre-referral investigative subpoena that was directed by the preliminary hearing officer and the counsel's statement of the reasons for such refusal;
- (G) Recommendations for any necessary modifications to the form of the charges and specifications;
- (H) A statement of whether the preliminary hearing officer examined evidence or heard witnesses relating to any uncharged offenses in accordance with R.C.M. 405(f)(2), and, for each such offense, the preliminary hearing officer's reasoning and conclusions as to whether there is probable cause to believe that the accused committed the offense and whether the convening authority would have court-martial jurisdiction over the offense if it were charged;
- (I) A notation of any objections if required under R.C.M. 405(k)(7);
- (J) The recommendation of the preliminary hearing officer as to the disposition that should be made of the charges and specifications in the interest of justice and discipline. In

making this disposition recommendation, the preliminary hearing officer may consider any evidence admitted during the preliminary hearing and matters submitted under R.C.M. 405(l);

(K) The written summary and analysis required by R.C.M. 405(l)(3)(A); and

(L) A notation as to whether the parties or the preliminary hearing officer considered any offense to be a covered offense.

(3) *Sealed exhibits and proceedings.* If the preliminary hearing report contains exhibits, proceedings, or other matters ordered sealed by the preliminary hearing officer in accordance with R.C.M. 1113, counsel for the Government shall cause such materials to be sealed so as to prevent unauthorized viewing or disclosure.

(4) *Distribution of preliminary hearing report.* The preliminary hearing officer shall promptly cause the preliminary hearing report to be delivered to the convening authority or, for hearings requested by a special trial counsel, to the special trial counsel. Counsel for the Government shall promptly cause a copy of the report to be delivered to each accused. The convening authority or, for hearings requested by a special trial counsel, the special trial counsel shall promptly determine what disposition will be made in the interest of justice and discipline in accordance with R.C.M. 401 or R.C.M. 401A.

(5) *Objections to the preliminary hearing officer's report.* Upon receipt of the report, the parties shall have five days to submit objections to the preliminary hearing officer. Any objection to the preliminary hearing report shall be made to the convening authority who directed the preliminary hearing, via the preliminary hearing officer. The objection shall be served upon the opposing party, and government counsel must provide notice of the objection to any named victim or named victim's counsel, if any. The preliminary hearing officer will forward the objections to the convening authority as soon as practicable. The convening authority may direct

that the preliminary hearing be reopened or take other action, as appropriate. For cases where a special trial counsel has exercised authority, the special trial counsel may request the convening authority reopen the preliminary hearing. Upon such request, the convening authority shall reopen the preliminary hearing. This paragraph does not prohibit a convening authority or special trial counsel from taking other action prior to the expiration of five days allotted for submitting objections. Failure to make a timely objection under this rule shall constitute waiver of the objection.

(n) *Waiver.* The accused may waive a preliminary hearing. However, the preliminary hearing may still be conducted notwithstanding the waiver. Relief from the waiver may be granted by the convening authority, a superior convening authority, or the military judge, as appropriate, for good cause shown. For offenses over which a special trial counsel has exercised authority, a special trial counsel may grant relief from the waiver. If a special trial counsel declines to grant relief from the waiver and the case is referred, the accused may request relief from the military judge.”

(gg) R.C.M. 406 is amended to read as follows:

“Rule 406. Pretrial advice and special trial counsel determinations

(a) *Pretrial Advice by the Staff Judge Advocate.*

(1) *General court-martial.* Except as provided by R.C.M. 406(b), before any charge may be referred for trial by a general court-martial, it shall be submitted to the staff judge advocate of the convening authority for consideration and advice. The advice of the staff judge advocate shall include a written and signed statement which sets forth the staff judge advocate’s:

(A) Conclusion with respect to whether each specification alleges an offense under the UCMJ;

(B) Conclusion with respect to whether there is probable cause to believe that the accused committed the offense charged in the specification;

(C) Conclusion with respect to whether a court-martial would have jurisdiction over the accused and the offense; and

(D) Recommendation as to the disposition that should be made of the charges and specifications by the convening authority in the interest of justice and discipline.

(2) *Special-court martial.* Subject to R.C.M. 406(b), before any charge may be referred for trial by a special court-martial, the convening authority shall consult a judge advocate on relevant legal issues. Such issues may include:

(A) Whether each specification alleges an offense under the UCMJ;

(B) Whether there is probable cause to believe the accused committed the offense(s) charged;

(C) Whether a court-martial would have jurisdiction over the accused and the offense;

(D) The form of the charges and specifications and any necessary modifications; and

(E) Any other factors relating to disposition of the charges and specifications in the interest of justice and discipline.

(b) *Special trial counsel determinations.* For all charges alleging covered offenses, and other charges over which special trial counsel has exercised authority and has not deferred, referral to a special or general court-martial may be made only by a special trial counsel and the referral must be accompanied by a special trial counsel's written determination that:

(1) each specification under a charge alleges an offense under the UCMJ;

- (2) there is probable cause to believe that the accused committed the offense charged; and
- (3) a court-martial would have jurisdiction over the accused and the offense.

(c) *Distribution.*

(1) Subject to R.C.M. 406(c)(2), a copy of the written advice of the staff judge advocate shall be provided to the defense if charges are referred for trial by general court-martial.

(2) For those cases over which special trial counsel exercises exclusive authority, a copy of the written determination by special trial counsel shall be provided to the defense if charges are referred for trial by general or special court-martial.”

(hh) R.C.M. 406A is deleted.

(ii) R.C.M. 407(a)(1) is amended to read as follows:

“(a) *Disposition.* Except for covered offenses and any other charges over which a special trial counsel has exercised authority and has not deferred, a commander exercising general court-martial jurisdiction, when in receipt of charges, may:

- (1) Dismiss any charge;
- (2) Forward any charge (or, after dismissing charges, the matter) to a subordinate commander for disposition;
- (3) Forward any charge to a superior commander for disposition;
- (4) Subject to R.C.M. 201(f)(2)(D) and (E), 601(d), and 1301(c), refer any charge to a summary court-martial or to a special court-martial for trial;
- (5) Unless otherwise prescribed by the Secretary concerned, direct a preliminary hearing under R.C.M. 405, after which additional action under this rule may be taken;
- (6) Subject to R.C.M. 601(d), refer any charge to a general court-martial.”

(jj) R.C.M. 407(b) is amended to read as follows:

“(b) *National security matters.*

(1) Subject to R.C.M. 407(b)(2), when in receipt of charges the trial of which the commander exercising general court-martial jurisdiction finds would probably be detrimental to the prosecution of a war or harmful to national security, that commander, unless otherwise prescribed by regulations of the Secretary concerned, shall determine whether trial is warranted and, if so, whether the security considerations involved are paramount to trial. As the commander finds appropriate, the commander may dismiss the charges, authorize trial of them, or forward them to a superior authority.

(2) For charges and specifications over which a special trial counsel has exercised authority and has not deferred and a commander believes trial would be detrimental to the prosecution of a war or harmful to national security, the matter shall be forwarded to the Secretary concerned.

(kk) A new R.C.M. 502(d)(1)(C) is inserted immediately after R.C.M. 502(d)(1)(B) to read as follows:

“(C) *Qualifications of special trial counsel.* Only judge advocates qualified, certified, and assigned as special trial counsel may be detailed as special trial counsel in general and special courts-martial. In accordance with regulations prescribed by the Secretary concerned, a special trial counsel shall be a judge advocate who is a member of the bar of a Federal court or a member of the bar of the highest court of a State; and is certified to be qualified, by reason of education, training, experience, and temperament, for duty as a special trial counsel by the Judge Advocate General of the armed force of which the officer is a member or, in the case of the Marine Corps, the Staff Judge Advocate to the Commandant of the Marine Corps. Special trial

counsel shall be well-trained, experienced, highly-skilled and competent in handling cases involving covered offenses.”

(II) R.C.M. 502(d)(3)(A) is amended to read as follows:

“(A) The accuser, except that any determination by a special trial counsel to prefer or refer charges shall not disqualify that special trial counsel;”.

(mm) R.C.M. 503(a) is amended to read as follows:

“(a) *Members.*

(1) *In general.* The convening authority shall—

(A) detail qualified persons as members for courts-martial in accordance with the criteria described in Article 25;

(B) state whether the military judge is—

(i) authorized to impanel a specified number of alternate members; or

(ii) authorized to impanel alternate members only if, after the exercise of all challenges, excess members remain; and

(C) provide a list of the detailed members to the military judge to randomize in accordance with R.C.M. 911.”

(nn) R.C.M. 503(c)(1) is amended to read as follows:

“(1) *By whom detailed.* Trial and defense counsel, assistant trial and defense counsel, and associate defense counsel shall be detailed in accordance with these rules and the regulations of the Secretary concerned. If authority to detail counsel has been delegated to a person, that person may detail himself or herself as counsel for a court-martial. For each general and special court-martial for which charges and specifications were referred by special trial counsel, a special trial counsel shall be detailed as trial counsel, and, in accordance with regulations prescribed by the

Secretary concerned, a special trial counsel may detail other trial counsel who are judge advocates. In a capital case, counsel learned in the law applicable to such cases under R.C.M. 502(d)(2)(C) shall be assigned in accordance with regulations of the Secretary concerned.”

(oo) R.C.M. 504(b)(1) is amended to read as follows:

“(1) *General courts-martial.* Unless otherwise limited by superior competent authority, general courts-martial may be convened by persons occupying positions designated in Article 22(a) and by any commander designated by the Secretary concerned or empowered by the President. A commanding officer shall not be considered an accuser solely due to the role of the commanding officer in convening a special or general court-martial to which charges and specifications were referred by a special trial counsel.”

(pp) R.C.M. 504(b)(2)(B)(i) is amended to read as follows:

“(i) In the Army, Air Force, or Space Force, by the officer exercising general court-martial jurisdiction over the command; or”.

(qq) R.C.M. 505(c)(1)(A) is amended to read as follows:

“(A) *By convening authority.* Before the court-martial is assembled, the convening authority may change the members detailed to the court-martial without showing cause. New members shall be detailed in accordance with R.C.M. 503(a).”

(rr) R.C.M. 505(c)(2)(B) is amended to read as follows:

“(B) *New members.* In accordance with R.C.M. 503(a), new members may be detailed after assembly only when, as a result of excusals under R.C.M. 505(c)(2)(A), the number of members of the court-martial is reduced below the number of members required under R.C.M. 501(a), or the number of enlisted members, when the accused has made a timely written request for enlisted members, is reduced below one-third of the total membership.”

(ss) R.C.M. 601 is amended to read as follows:

“Rule 601. Referral

(a) *In general.* Referral is the order of a convening authority or a special trial counsel that one or more charges and specifications against an accused will be tried by a specified court-martial.

(b) *Who may refer.*

(1) Except as provided in R.C.M. 601(b)(2), any convening authority may refer charges to a court-martial convened by that convening authority or a predecessor, unless the power to do so has been withheld by superior competent authority.

(2) For charges over which a special trial counsel has exercised authority and has not deferred, only a special trial counsel may refer charges to a court-martial.

(c) *Disqualification.*

(1) Except as provided in R.C.M. 601(c)(2), an accuser may not refer charges to a general or special court-martial.

(2) A special trial counsel shall not be disqualified from referring charges to a general or special court-martial as a result of having preferred charges or having caused charges to be preferred.

(d) *When charges may be referred.*

(1) *Basis for referral.*

(A) Except as provided in R.C.M. 601(d)(1)(B), if the convening authority finds or is advised by a judge advocate that there is probable cause to believe that an offense triable by a court-martial has been committed and that the accused committed it, and that the specification alleges an offense, the convening authority may refer it. The finding may be based on hearsay in whole or in part. The convening authority or judge advocate may consider information from any

source and shall not be limited to the information reviewed by any previous authority, but a case may not be referred to a general or special court-martial except in compliance with R.C.M. 601(d)(2) or (d)(3). The convening authority or judge advocate shall not be required before charges are referred to resolve legal issues, including objections to evidence, which may arise at trial.

(B) For offenses over which a special trial counsel has exercised authority and has not deferred, if a special trial counsel makes a written determination that each specification under a charge alleges an offense under the UCMJ, there is probable cause to believe that the accused committed the offense charged, and the court-martial would have jurisdiction over the accused and the offense, a special trial counsel may refer it. The finding may be based on hearsay in whole or in part. A special trial counsel may consider information from any source and shall not be limited to the information reviewed by any previous authority, but a case may not be referred to a general court-martial except in compliance with R.C.M. 601(d)(2) or (d)(3). A special trial counsel shall not be required before charges are referred to resolve legal issues, including objections to evidence, which may arise at trial.

(2) *Consideration.* Referral authorities shall consider whether the admissible evidence will probably be sufficient to obtain and sustain a conviction.

(3) *General courts-martial.* Charges may not be referred to a general court-martial unless there has been substantial compliance with the preliminary hearing requirements of R.C.M. 405 and:

(A) The convening authority has received the advice of the staff judge advocate required under R.C.M. 406(a)(1) and Article 34(a); or

(B) A special trial counsel has made a written determination as required under R.C.M. 406(b) and Article 34(c).

(4) *Special courts-martial.* Charges may not be referred to a special court-martial unless:

(A) The convening authority has consulted with a judge advocate as required under R.C.M. 406(a)(2) and Article 34(b); or

(B) A special trial counsel has made a written determination as required under R.C.M. 406(b) and Article 34(c).

(e) *How charges shall be referred.*

(1) *Order, instructions.* Referral shall be by the personal order of the referral authority.

(A) *Capital cases.* If a case is to be tried as a capital case, the referral authority shall so indicate by including a special instruction on the charge sheet in accordance with R.C.M. 1004(b)(1).

(B) *Special court-martial consisting of a military judge alone.* If a case is to be tried as a special court-martial consisting of a military judge alone under Article 16(c)(2)(A), the referral shall so indicate by including a special instruction on the charge sheet prior to arraignment.

(C) *Other instructions.* The referral authority may include any other additional instructions in the order as may be required.

(2) *Joinder of offenses.* In the discretion of the referral authority, two or more offenses charged against an accused may be referred to the same court-martial for trial, whether serious or minor offenses or both, regardless of whether the offenses are connected. Additional charges may be joined with other charges for a single trial at any time before arraignment if all necessary procedural requirements concerning the additional charges have been complied with. After

arraignment of the accused upon charges, no additional charges may be referred to the same trial without consent of the accused.

(3) *Joinder of accused.* Allegations against two or more accused may be referred for joint trial if the accused are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such accused may be charged in one or more specifications together or separately, and every accused need not be charged in each specification. Related allegations against two or more accused which may be proved by substantially the same evidence may be referred to a common trial.

(f) *Superior convening authorities.* Except as otherwise provided in these rules, a superior competent authority may cause charges, whether or not referred, to be transmitted to the authority for further consideration, including, if appropriate, referral.

(g) *Parallel convening authorities.*

(1) Except as provided in R.C.M. 601(g)(2), if it is impracticable for the original convening authority to continue exercising authority over the charges, the convening authority may cause the charges, even if referred, to be transmitted to a parallel convening authority. This transmittal must be in writing and in accordance with such regulations as the Secretary concerned may prescribe. Subsequent actions taken by the parallel convening authority are within the sole discretion of that convening authority.

(2) For offenses over which a special trial counsel has exercised authority and has not deferred, a convening authority seeking to transfer charges to a parallel convening authority may do so in accordance with these rules and such regulations prescribed by the Secretary concerned.”

(tt) R.C.M. 603(a) is amended to read as follows:

“(a) *In general.* Any person forwarding, acting upon, or prosecuting charges on behalf of the United States, except a preliminary hearing officer appointed under R.C.M. 405, may make major and minor changes to charges or specifications in accordance with this rule. For charges over which a special trial counsel has exercised authority and has not deferred, only a special trial counsel may make or cause to be made major and minor changes to charges or specifications in accordance with this rule.”

(uu) R.C.M. 604(a) is amended to read as follows:

“(a) *Withdrawal.*

(1) Except as provided in R.C.M. 604(a)(2), the convening authority or a superior competent authority may for any reason cause any charge or specification to be withdrawn from a court-martial at any time before findings are announced.

(2) For charges over which a special trial counsel has exercised authority and has not deferred, only a special trial counsel may withdraw or cause to be withdrawn any charge or specification from the court-martial at any time before findings are announced.”

(vv) R.C.M. 701(a) is amended to read as follows:

“(a) *Disclosure by trial counsel.* Except as otherwise provided in R.C.M. 701(f) and (g)(2), and unless previously disclosed to the defense, trial counsel shall provide the following to the defense:

(1) *Papers accompanying charges; convening orders; statements.* As soon as practicable after service of charges under R.C.M. 602, the trial counsel shall provide the defense with copies of, or, if extraordinary circumstances make it impracticable to provide copies, permit the defense to inspect:

(A) All papers that accompanied the charges presented to the convening authority;

(B) Any written determination made by a special trial counsel pursuant to Article 34;

(C) Any written recommendation from a commander as to disposition;

(D) Any papers sent with charges upon a rehearing or new trial;

(E) The convening order and any amending orders; and

(F) Any sworn or signed statement relating to an offense charged in the case that is in the possession of trial counsel.

(2) *Documents, tangible objects, reports.*

(A) After service of charges, upon request of the defense, the Government shall permit the defense to inspect any books, papers, documents, data, photographs, tangible objects, buildings, or places, or copies of portions of these items, if the item is within the possession, custody, or control of military authorities and—

- (i) the item is relevant to defense preparation;
- (ii) the Government intends to use the item in the case-in-chief at trial;
- (iii) the Government anticipates using the item in rebuttal; or
- (iv) the item was obtained from or belongs to the accused.

(B) After service of charges, upon request of the defense, the Government shall permit the defense to inspect the results or reports of physical or mental examinations, and of any scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of military authorities, the existence of which is known or by the exercise of due diligence may become known to the trial counsel if

- (i) the item is relevant to defense preparation;
- (ii) the Government intends to use the item in the case-in-chief at trial; or

(iii) the Government anticipates using the item in rebuttal.

(3) *Witnesses.* Before the beginning of trial on the merits, trial counsel shall notify the defense of the names and contact information of the witnesses the trial counsel intends to call:

(A) In the prosecution case-in-chief; and

(B) To rebut a defense of alibi, innocent ingestion, or lack of mental responsibility, when the trial counsel has received timely notice under R.C.M. 701(b)(1) or (2).

(4) *Prior convictions of accused offered on the merits.* Before arraignment, the trial counsel shall notify the defense of any records of prior civilian or court-martial convictions of the accused of which the trial counsel is aware and which the trial counsel may offer on the merits for any purpose, including impeachment, and shall permit the defense to inspect such records when they are in the trial counsel's possession.

(5) *Information to be offered at sentencing.* Upon request of the defense, the trial counsel shall:

(A) Permit the defense to inspect such written material as will be presented by the prosecution at the presentencing proceedings; and

(B) Notify the defense of the names and contact information of the witnesses the trial counsel intends to call at the presentencing proceedings under R.C.M. 1001(b).

(6) *Evidence favorable to the defense.* The trial counsel shall, as soon as practicable, disclose to the defense the existence of evidence known to the trial counsel which reasonably tends to—

(A) Negate the guilt of the accused of an offense charged;

(B) Reduce the degree of guilt of the accused of an offense charged;

(C) Reduce the punishment; or

(D) Adversely affect the credibility of any prosecution witness or evidence.”

(ww) R.C.M. 701(b)(4) is amended to read as follows:

“(4) *Reports of examination and tests.* If the defense requests disclosure under R.C.M. 701(a)(2)(B), upon compliance with such request by the Government, the defense, on request of the trial counsel, shall (except as provided in R.C.M. 706, Mil. R. Evid. 302, and Mil. R. Evid. 513) permit the trial counsel to inspect the results or reports, or copies thereof, of any physical or mental examinations and of any scientific tests or experiments made in connection with the particular case if the item is within the possession, custody, or control of the defense; and—

(A) the defense intends to use the item in the defense case-in-chief at trial; or
(B) the item was prepared by a witness whom the defense counsel intends to call at trial and the results or reports relate to that witness’ testimony.”

(xx) R.C.M. 702(b) is amended to read as follows:

“(b) *Who may order.* Upon request of a party:

(1) Subject to R.C.M. 702(b)(2), before referral, a convening authority, or, after referral, the convening authority or the military judge, may order a deposition.

(2) For offenses over which special trial counsel exercises authority:

(i) Before referral, only a military judge may order a deposition, pursuant to R.C.M. 309(b)(3).

(ii) After referral, only a military judge may order a deposition.”

(yy) R.C.M. 703(a) is amended to read as follows:

“(a) *In general.* The prosecution, defense, and court-martial shall have equal opportunity to obtain witnesses and evidence, subject to the limitations set forth in R.C.M. 701, including the benefit of compulsory process.”

(zz) R.C.M. 703(d) is amended to read as follows:

“(d) *Employment of expert witnesses and consultants.*

(1) *Funding experts for the prosecution.* When the employment of a prosecution expert witness or consultant is considered necessary, counsel for the Government shall, in advance of employment of the expert, and with notice to the defense, submit a request for funding of the expert in accordance with regulations prescribed by the Secretary concerned.

(2) *Funding experts for the defense.* When the appointment or employment of a defense expert witness or consultant is considered necessary, the defense may submit a request for the appointment or funding of the expert in accordance with regulations prescribed by the Secretary concerned.

(A) After referral of charges, a defense request for an expert witness or consultant may be raised before the military judge. Motions for expert consultants may be raised *ex parte*. The military judge shall determine:

(i) in the case of an expert witness, whether the testimony is relevant and necessary;

(ii) in the case of an expert consultant, whether the assistance is necessary for an adequate defense.

(B) If the military judge grants a motion for the appointment or employment of a defense expert witness or consultant, the expert witness or consultant, or an adequate substitute, shall be provided in accordance with regulations prescribed by the Secretary concerned. In the absence of advance approval by an official authorized to grant such approval under the regulations prescribed by the Secretary concerned, expert witnesses and consultants may not be paid fees other than those to which they are entitled under R.C.M. 207(g)(3)(E).

(3) *Notice of expert witnesses.*

(A) *Expert witnesses.*

(i) *Government.* In addition to the requirements of R.C.M. 701(a)(3), the Government shall provide the defense a written summary of the expected testimony from the expert witness.

(ii) *Defense.* After referral of charges, in addition to the requirements of R.C.M. 701(b)(1), the defense shall provide the Government a written summary of the expected testimony from the expert witness.

(B) *Timing.* The military judge shall set a date upon which notices under R.C.M. 703(d)(3)(A) are due to the opposing party.

(C) *Failure to comply.* If at any time it is brought to the attention of the military judge that a party has failed to comply with this rule, the military judge may take one or more of the following actions:

(i) Order the required notice;
(ii) Order the party to permit discovery;
(iii) Grant a continuance;
(iv) Prohibit the party from introducing evidence, calling a witness, or raising a defense not disclosed; and
(v) Enter such other order as is just under the circumstances.”

(aaa) R.C.M. 703(g)(3) is amended to read as follows:

“(3) *Civilian witnesses and evidence not under the control of the Government—subpoenas.*

(A) *In general.* The presence of witnesses not on active duty and evidence not under control of the Government may be obtained by subpoena.

(B) *Contents.* A subpoena shall state the command by which the proceeding or investigation is directed, and the title, if any, of the proceeding. A subpoena shall command each person to whom it is directed to attend and give testimony at the time and place specified therein, or to produce evidence—including books, papers, documents, data, writings, or other objects or electronically stored information designated therein at the proceeding or at an earlier time for inspection by the parties. A subpoena shall not command any person to attend or give testimony at an Article 32 preliminary hearing.

(C) *Investigative subpoenas.*

(i) *In general.* In the case of a subpoena issued before referral for the production of evidence for use in an investigation, the subpoena shall command each person to whom it is directed to produce the evidence requested for inspection by the Government counsel who issued the subpoena or for inspection in accordance with an order issued by the military judge under R.C.M. 309(b).

(ii) *Subpoenas for personal or confidential information about a victim.*

After preferral, a subpoena requiring the production of personal or confidential information about a victim named in a specification may be served on an individual or organization by those authorized to issue a subpoena under R.C.M. 703(g)(3)(E) or with the consent of the victim. Before issuing a subpoena under this provision and unless there are exceptional circumstances, the victim must be given notice so that the victim can move for relief under R.C.M 703(g)(3)(I) or otherwise object.

(D) *Ex parte request by defense.* Upon request by the defense after referral, including an *ex parte* request, the military judge shall issue a subpoena to compel the production of witnesses if the witness's testimony is determined to be relevant and necessary.

(E) *Who may issue.* A subpoena may be issued by:

- (i) the military judge, after referral;
- (ii) the summary court-martial;
- (iii) the trial counsel of a general or special court-martial;
- (iv) the president of a court of inquiry;
- (v) an officer detailed to take a deposition; or
- (vi) in the case of a pre-referral investigative subpoena, a military judge

or, when issuance of the subpoena is authorized by a general court-martial convening authority, the detailed trial counsel or counsel for the Government.

(F) *Notice.* Notice shall be given to all parties for any subpoena issued for a witness post-referral unless, for good cause, the military judge issues a protective order.

(G) *Service.* A subpoena may be served by the person authorized by this rule to issue it, a United States Marshal, or any other person who is not less than 18 years of age. Service shall be made by delivering a copy of the subpoena to the person named and, in the case of a subpoena of an individual to provide testimony, by providing to the person named travel orders and a means for reimbursement for fees and mileage as may be prescribed by the Secretary concerned, or in the case of hardship resulting in the subpoenaed witness's inability to comply with the subpoena absent initial Government payment, by providing to the person named travel orders, fees, and mileage sufficient to comply with the subpoena in rules prescribed by the Secretary concerned.

(H) *Place of service.*

(i) *In general.* A subpoena may be served at any place within the United States, its Territories, Commonwealths, or possessions.

(ii) *Foreign territory.* In foreign territory, the attendance of civilian witnesses and evidence not under the control of the Government may be obtained in accordance with existing agreements or, in the absence of agreements, with principles of international law.

(iii) *Occupied territory.* In occupied enemy territory, the appropriate commander may compel the attendance of civilian witnesses located within the occupied territory.

(I) *Relief.* If a person subpoenaed requests relief on grounds that compliance is unreasonable, oppressive, or prohibited by law, the military judge or, if before referral, a military judge detailed under Article 30a, shall review the request and shall—

- (i) order that the subpoena be modified or quashed, as appropriate; or
- (ii) order the person to comply with the subpoena.

(J) *Neglect or refusal to appear or produce evidence.*

(i) *Issuance of warrant of attachment.* If the person subpoenaed neglects or refuses to appear or produce evidence, the military judge or, if before referral, a military judge detailed under Article 30a or a general court-martial convening authority, may issue a warrant of attachment to compel the attendance of a witness or the production of evidence, as appropriate.

(ii) *Requirements.* A warrant of attachment may be issued only upon probable cause to believe that the witness or evidence custodian was duly served with a subpoena, that the subpoena was issued in accordance with these rules, that a means of reimbursement of fees and mileage, if applicable, was provided to the witness or advanced to the

witness in cases of hardship, that the witness or evidence is material, that the witness or evidence custodian refused or willfully neglected to appear or produce the subpoenaed evidence at the time and place specified on the subpoena, and that no valid excuse is reasonably apparent for the witness' failure to appear or produce the subpoenaed evidence.

(iii) *Form.* A warrant of attachment shall be written. All documents in support of the warrant of attachment shall be attached to the warrant, together with the charge sheet and convening orders.

(iv) *Execution.* A warrant of attachment may be executed by a United States Marshal or such other person who is not less than 18 years of age as the authority issuing the warrant may direct. Only such non-deadly force as may be necessary to bring the witness before the court-martial or other proceeding or to compel production of the subpoenaed evidence may be used to execute the warrant. A witness attached under this rule shall be brought before the court-martial or proceeding without delay and shall testify or provide the subpoenaed evidence as soon as practicable and be released.

(v) *Definition.* For purposes of R.C.M. 703(g)(3)(J)(i), "military judge" does not include a summary court-martial."

(bbb) R.C.M. 704(c) is amended to read as follows:

"(c) *Authority to grant immunity.*

(1) Except as provided in R.C.M. 704(c)(2), a general court-martial convening authority, or designee, may grant immunity, and may do so only in accordance with this rule.

(2) For offenses over which a special trial counsel has exercised authority and has not deferred, a special trial counsel designated by the Secretary concerned, or that designated special trial counsel's designee, may grant immunity, and may do so only in accordance with this rule.

(3) *Persons subject to the UCMJ.* A general court-martial convening authority, a special trial counsel designated by the Secretary concerned, or their designees, may grant immunity to a person subject to the UCMJ. However, they may grant immunity to a person subject to the UCMJ extending to a prosecution in a United States District Court only when specifically authorized to do so by the Attorney General of the United States or other authority designated under chapter 601 of title 18 of the U.S. Code.

(4) *Persons not subject to the UCMJ.* A general court-martial convening authority, a special trial counsel designated by the Secretary concerned, or their designees, may grant immunity to persons not subject to the UCMJ only when specifically authorized to do so by the Attorney General of the United States or other authority designated in chapter 601 of title 18 of the U.S. Code.

(5) *Limitations on delegation.*

(A) Subject to Service regulations, the authority to grant immunity under this rule may be delegated in writing at the discretion of the general court-martial convening authority to a subordinate special court-martial convening authority. Further delegation is not permitted. The authority to grant immunity or delegate the authority to grant immunity may be limited by superior authority.

(B) Subject to Service regulations, the authority to grant immunity under this rule may be delegated at the discretion of a special trial counsel designated by the Secretary concerned to a subordinate special trial counsel. The authority to grant immunity or delegate the authority to grant immunity may be limited by superior authority. Any delegation shall be in writing.”

(ccc) R.C.M. 704(d) is amended to read as follows:

“(d) *Procedure.*

(1) A grant of immunity shall be written and signed by the individual convening authority, special trial counsel designated by the Secretary concerned, or designee who issues it. The grant shall include a statement of the authority under which it is made and shall identify the matters to which it extends.

(2) Subject to Service regulations, the convening authority shall order a person subject to the UCMJ who has received a grant of immunity, to answer questions by investigators or to testify or answer questions by counsel pursuant to that grant of immunity.”

(ddd) R.C.M. 704(e) is amended to read as follows:

“(e) *Decision to grant immunity.* Unless limited by superior competent authority, the decision to grant immunity is a matter within the sole discretion of the general court-martial convening authority, special trial counsel designated by the Secretary concerned, as applicable, or their designees. However, if a defense request to immunize a witness has been denied, the military judge may, upon motion by the defense, grant appropriate relief directing that either an appropriate convening authority or special trial counsel designated by the Secretary concerned, as applicable, grant testimonial immunity to a defense witness or, as to the affected charges and specifications, the proceedings against the accused be abated, upon findings that:

- (1) The witness intends to invoke the right against self-incrimination to the extent permitted by law if called to testify;
- (2) The Government has engaged in discriminatory use of immunity to obtain a tactical advantage, or the Government through its own overreaching, has forced the witness to invoke the privilege against self-incrimination; and

(3) The witness' testimony is material, clearly exculpatory, not cumulative, not obtainable from any other source, and does more than merely affect the credibility of other witnesses."

(eee) R.C.M. 705(a) is revised to read as follows:

"(a) *In general.* Subject to such limitations as the Secretary concerned may prescribe, an accused and the convening authority or the accused and special trial counsel, as applicable, may enter into a plea agreement in accordance with this rule. In cases over which special trial counsel has exercised authority and has not deferred, an agreement may only be entered into between special trial counsel and the accused; however, any such agreement may bind convening authorities and other commanders subject to such limitations as prescribed by the Secretary concerned."

(fff) R.C.M. 705(b) is amended to read as follows:

"(b) *Nature of agreement.* A plea agreement may include:

(1) A promise by the accused to plead guilty to, or to enter a confessional stipulation as to, one or more charges and specifications, and to fulfill such additional terms or conditions that may be included in the agreement and that are not prohibited under this rule; and

(2) A promise by the convening authority or special trial counsel, as applicable, to do one or more of the following:

(A) Refer the charges to a certain type of court-martial;

(B) Refer a capital offense as noncapital;

(C) Withdraw one or more charges or specifications from the court-martial;

(D) Have trial counsel present no evidence as to one or more specifications or portions thereof; and

(E) Limit the sentence that may be adjudged by the court-martial for one or more charges and specifications in accordance with R.C.M. 705(d); or

(3) A promise by either the convening authority or special trial counsel to take other action within their authority.”

(ggg) R.C.M. 705(c)(2) is amended to read as follows:

“(2) *Permissible terms and conditions.* R.C.M. 705(c)(1)(A) and (1)(B) do not prohibit the convening authority, special trial counsel, or the accused from proposing the following additional conditions:

(A) A promise to enter into a stipulation of fact concerning offenses to which a plea of guilty or to which a confessional stipulation will be entered;

(B) A promise to testify as a witness in the trial of another person;

(C) A promise to provide restitution;

(D) A promise to conform the accused’s conduct to certain conditions of probation before action by the convening authority in a summary court-martial or before entry of judgment in a general or special court-martial as well as during any period of suspension of the sentence, provided that the requirements of R.C.M. 1108 must be complied with before an alleged violation of such terms may relieve the Government of the obligation to fulfill the agreement;

(E) A promise to waive procedural requirements such as the Article 32 preliminary hearing, the right to trial by a court-martial composed of members, the right to request trial by military judge alone, the right to elect sentencing by members if applicable, or the opportunity to obtain the personal appearance of witnesses at presentencing proceedings;

(F) When applicable, a provision requiring that the sentences to confinement adjudged by the military judge for two or more charges or specifications be served concurrently or consecutively. Such an agreement shall identify the charges or specifications that will be served concurrently or consecutively; and

(G) Any other term or condition that is not contrary to or inconsistent with this rule.”

(hhh) R.C.M. 705(e)(3) is amended to read as follows:

“(3) *Acceptance by the convening authority or special trial counsel.*

(A) *In general.* The convening authority or special trial counsel, as applicable, may either accept or reject an offer of the accused to enter into a plea agreement or may propose by counteroffer any terms or conditions not prohibited by law or public policy. The decision whether to accept or reject an offer is within the sole discretion of the convening authority or special trial counsel, as applicable. When the convening authority has accepted a plea agreement, the agreement shall be signed by the convening authority or by a person, such as the staff judge advocate or trial counsel, who has been authorized by the convening authority to sign. When special trial counsel has accepted a plea agreement, the agreement shall be signed by special trial counsel.

(B) *Victim consultation.* Prior to the convening authority or special trial counsel, as applicable, accepting a plea agreement, the convening authority or special trial counsel shall make the convening authority’s or special trial counsel’s best efforts to provide the victim an opportunity to submit views concerning the plea agreement terms and conditions in accordance with regulations prescribed by the Secretary concerned. The convening authority or special trial counsel, as applicable, shall consider any such views provided prior to accepting a plea

agreement. For purposes of this rule, a “victim” is an individual who is alleged to have suffered direct physical, emotional, or pecuniary harm as a result of the matters set forth in a charge or specification under consideration and is named in one of the specifications under consideration.”

(iii) R.C.M. 705(e)(4) is amended to read as follows:

“(4) *Withdrawal.*

(A) *By accused.* The accused may withdraw from a plea agreement at any time prior to the sentence being announced. If the accused elects to withdraw from the plea agreement after the acceptance of the plea agreement but before the sentence is announced, the military judge shall permit the accused to withdraw only for good cause shown. Additionally, the accused may withdraw a plea of guilty or a confessional stipulation entered pursuant to a plea agreement only as provided in R.C.M. 910(h) or 811(d).

(B) *By convening authority or special trial counsel.* The convening authority or special trial counsel, as applicable, may withdraw from a plea agreement at any time:

(i) before substantial performance by the accused of promises contained in the agreement;

(ii) upon the failure by the accused to fulfill any material promise or condition in the agreement;

(iii) when inquiry by the military judge discloses a disagreement as to a material term in the agreement; or

(iv) if findings are set aside because a plea of guilty entered pursuant to the agreement is held improvident on appellate review.”

(jjj) R.C.M. 706(b)(1) is amended to read as follows:

“(1) *Before referral.* Before referral of charges, an inquiry into the mental capacity or mental responsibility of the accused may be ordered by any applicable convening authority, or by a military judge or magistrate in a proceeding conducted in accordance with R.C.M. 309.”

(kkk) R.C.M. 706(b)(2) is amended to read as follows:

“(2) *After referral.* After referral of charges, an inquiry into the mental capacity or mental responsibility of the accused may be ordered by the military judge. The convening authority may order such an inquiry after referral of charges but before beginning of the first session of the court-martial (including any Article 39(a) session) when the military judge is not reasonably available. The military judge may order a mental examination of the accused regardless of any earlier determination by any authority.”

(III) R.C.M. 707(b)(3)(D) is amended to read as follows:

“(D) *Rehearings.* If a rehearing is ordered or authorized by an appellate court, a new 120-day time period under this rule shall begin on the date that the responsible convening authority or, for charges and specifications referred by a special trial counsel, the special trial counsel receives the record of trial and the opinion authorizing or directing a rehearing. An accused is brought to trial within the meaning of this rule at the time of arraignment under R.C.M. 904 or, if arraignment is not required (such as in the case of a sentence-only rehearing), at the time of the first session under R.C.M. 803.”

(mmm) R.C.M. 707(c)(1) is amended to read as follows:

“(1) *Procedure.* Prior to referral, all requests for pretrial delay, together with supporting reasons and with notice to the defense, will be submitted to a convening authority with authority over the accused for resolution. The convening authority may delegate this authority to an

Article 32 preliminary hearing officer. After referral, such requests for pretrial delay will be submitted to the military judge for resolution.”

(nnn) R.C.M. 707(d)(1) is amended to read as follows:

“(1) *Dismissal*. Dismissal will be with or without prejudice to the Government’s right to reinstitute court-martial proceedings against the accused for the same offense at a later date. The charges must be dismissed with prejudice where the accused has been deprived of his or her constitutional right to a speedy trial. In determining whether to dismiss charges with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case that lead to dismissal; the impact of a re-prosecution on the administration of justice; and any prejudice to the accused resulting from the denial of a speedy trial.”

(ooo) R.C.M. 707(f) is amended as follows:

“(f) *Priority*. When considering the disposition of charges and the ordering of trials, a convening authority or special trial counsel shall give priority to cases in which the accused is held under those forms of pretrial restraint defined by R.C.M. 304(a)(3)-(4). Trial of or other disposition of charges against any accused held in arrest or confinement pending trial shall be given priority.”

(ppp) R.C.M. 804 is amended to read as follows:

“Rule 804. Presence at court-martial proceedings

(a) *Accused*.

(1) *Presence required*. The accused shall be present at the arraignment, the time of the plea, every stage of the trial including sessions conducted under Article 39(a), voir dire and challenges of members, the return of the findings, presentencing proceedings, and post-trial sessions, if any, except as otherwise provided by this rule. Attendance at these proceedings shall

constitute the accused's appointed place of duty and, with respect to the accused's travel allowances, none of these proceedings shall constitute disciplinary action. This does not in any way limit authority to implement restriction, up to and including confinement, as necessary in accordance with R.C.M. 304 or R.C.M. 305.

(A) *Appearance*. The accused shall be properly attired in the uniform or dress prescribed by the military judge. An accused service member shall wear the insignia of grade and may wear any decorations, emblems, or ribbons to which the accused is entitled. The accused and defense counsel are responsible for ensuring that the accused is properly attired; however, upon request, the accused's commander shall render such assistance as may be reasonably necessary to ensure that the accused is properly attired.

(B) *Custody*. Responsibility for maintaining custody or control of an accused before and during trial may be assigned, subject to R.C.M. 304 and 305, and R.C.M. 804(c)(3), under such regulations as the Secretary concerned may prescribe.

(C) *Restraint*. Physical restraint shall not be imposed on the accused during open sessions of the court-martial unless prescribed by the military judge.

(2) *Continuation of proceeding without presence*. The further progress of the trial to and including the return of the findings and, if necessary, determination of a sentence shall not be prevented and the accused shall be considered to have waived the right to be present whenever an accused, initially present:

(A) Is voluntarily absent after arraignment (whether or not informed by the military judge of the obligation to remain during the trial); or

(B) After being warned by the military judge that disruptive conduct will cause the accused to be removed from the courtroom, persists in conduct which is such as to justify exclusion from the courtroom.

(3) *Remote presence of the accused.*

(A) Except as provided in R.C.M. 804(a)(3)(B), for Article 39(a) sessions, the military judge may order the accused be present via remote means through the use of audiovisual technology. Use of such audiovisual technology will satisfy the “presence” requirement of the accused only when the accused has a defense counsel physically present at the accused’s location or when the accused consents to presence by remote means with the opportunity for confidential consultation with defense counsel during the proceeding. Such technology may include two or more remote sites as long as all parties can see and hear each other.

(B) The accused may be present via remote means through the use of audiovisual technology for a plea inquiry under R.C.M. 910(d), (e) and (f), and presentencing proceedings before a military judge under R.C.M. 1001, only when there are exceptional circumstances that interfere with the normal administration of military justice, as determined by the military judge. The accused must consent to the use of audiovisual technology and defense counsel must be physically present at the accused’s location for the hearing.

(4) *Voluntary absence for limited purpose of child testimony.*

(A) *Election by accused.* Following a determination by the military judge that remote live testimony of a child is appropriate pursuant to Mil. R. Evid. 611(d)(3), the accused may elect to be voluntarily absent from the courtroom in order to preclude the use of procedures described in R.C.M. 914A.

(B) *Procedure.* The accused's absence will be conditional upon the accused being able to view the witness' testimony from a remote location. Normally, transmission of the testimony will include a system that will transmit the accused's image and voice into the courtroom from a remote location as well as transmission of the child's testimony from the courtroom to the accused's location. A one-way transmission may be used if deemed necessary by the military judge. The accused will also be provided private, contemporaneous communication with his counsel. The procedures described herein shall be employed unless the accused has made a knowing and affirmative waiver of these procedures.

(C) *Effect on accused's rights generally.* An election by the accused to be absent pursuant to R.C.M. 804(a)(4)(A) shall not otherwise affect the accused's right to be present at the remainder of the trial in accordance with this rule.

(b) *Military judge.*

(1) No court-martial proceeding, except the deliberations of the members, may take place in the absence of the military judge. The military judge may attend Article 39(a) sessions via remote means through the use of audiovisual technology.

(2) When a new military judge is detailed under R.C.M. 505(e)(2) after the presentation of evidence on the merits has begun in a trial before a military judge alone, trial may not proceed unless the accused requests, and the new military judge approves, trial by military judge alone, and a verbatim record of the testimony and evidence or a stipulation thereof is read to or played for the new military judge in the presence of the accused and counsel for both sides, or the trial proceeds as if no evidence had been presented.

(c) *Members.*

(1) Unless the accused is tried or sentenced by military judge alone, no court-martial proceeding may take place in the absence of any detailed member except: Article 39(a) sessions under R.C.M. 803; temporary excusal under R.C.M. 911(b); examination of members under R.C.M. 912(d); when the member has been excused under R.C.M. 505, 912(f), or 912A; as otherwise provided in R.C.M. 1104(d)(1); or as otherwise provided in this Manual.

(2) When after presentation of evidence on the merits has begun, a new member is impaneled under R.C.M. 912A, trial may not proceed unless the testimony and evidence previously admitted on the merits, if recorded verbatim, is read to or played for the new member in the presence of the military judge, the accused, and counsel for both sides, or, if not recorded verbatim, and in the absence of a stipulation as to such testimony and evidence, the trial proceeds as if no evidence has been presented.

(d) *Counsel.* As long as at least one qualified counsel for each party is present, other counsel for each party may be absent from a court-martial session. In the case of a court-martial requiring the detailing of a special trial counsel, the presence of a special trial counsel is required unless a special trial counsel determines otherwise and another trial counsel, who is qualified according to Article 27(b), is also present. An assistant counsel who lacks the qualifications necessary to serve as counsel for a party may not act at a session in the absence of such qualified counsel. For purposes of Article 39(a) sessions and subject to R.C.M. 804(a)(3), the presence of counsel may be satisfied via remote means through the use of audiovisual technology.

(e) *Victim and Victim's Counsel.* Subject to R.C.M. 914B, at the discretion of the military judge and for good cause, the victim and victim's counsel may be present through the use of audiovisual technology.”

(qqq) R.C.M. 805 is amended to read as follows:

“Rule 805. [Reserved]”.**(rrr) R.C.M. 810(a)(4) is amended to read as follows:**

“(4) *Additional charges*. A referral authority may refer additional charges for trial together with charges as to which a rehearing has been directed.”

(sss) R.C.M. 810(a)(5) is amended to read as follows:

“(5) *Rehearing impracticable*. If a rehearing was authorized on one or more findings, the convening authority, or in cases referred by a special trial counsel, a special trial counsel, may dismiss the affected charges if the referral authority determines that a rehearing is impracticable. If the referral authority dismisses such charges, a rehearing may proceed on any remaining charges not dismissed by the referral authority.”

(ttt) R.C.M. 810(f)(1) is amended to read as follows:

“(1) *In general*. A Court of Criminal Appeals may order a remand for additional fact finding, or for other reasons, in order to address a substantial issue on appeal. A remand under this subsection is generally not appropriate to determine facts or investigate matters which could, through a party’s exercise of reasonable diligence, have been investigated or considered at trial. Such orders shall be directed to the Chief Trial Judge. The Judge Advocate General, or the Judge Advocate General’s delegate, shall designate a general court-martial convening authority who shall provide support for the hearing. In cases which were referred by a special trial counsel, a special trial counsel designated under regulations prescribed by the Secretary concerned shall be notified of any remand.”

(uuu) R.C.M. 810(f)(3) is amended to read as follows:

“(3) *Remand impracticable*. If the general court-martial convening authority designated under R.C.M. 810(f)(1) or, in cases which were referred by a special trial counsel, a special trial

counsel determines that the remand is impracticable due to military exigencies or other reasons, a Government appellate attorney shall notify the Court of Criminal Appeals. Upon receipt of such notification, the Court of Criminal Appeals may take any action authorized by law that does not materially prejudice the substantial rights of the accused.”

(vvv) R.C.M. 902(b)(3) is amended to read as follows:

“(3) Where the military judge has been or will be a witness in the same case; is the accuser; has forwarded charges in the case with a personal recommendation as to disposition; has referred charges in the case; or, except in the performance of duties as military judge in a previous trial of the same or a related case, has expressed an opinion concerning the guilt or innocence of the accused.”

(www) R.C.M. 905(e)(2) is amended to read as follows:

“(2) Other motions, requests, defenses, or objections, except lack of jurisdiction, must be raised before the court-martial is adjourned for that case. Failure to raise such other motions, requests, defenses, or objections shall constitute forfeiture, absent an affirmative waiver.”

(xxx) R.C.M. 906(b)(3) is amended to read as follows:

“(3) *Corrections.* Correction of defects in the Article 32 preliminary hearing, pretrial advice, or a written determination by special trial counsel.”

(yyy) R.C.M. 906(b)(5) is amended to read as follows:

“(5) *Severance of specifications.* Severance of a duplicitous specification into two or more specifications.”

(zzz) R.C.M. 906(b)(7) is amended to read as follows:

“(7) *Discovery and Production.* Discovery and production of evidence and witnesses.”

(aaaa) R.C.M. 906(b)(9) is amended to read as follows:

“(9) *Severance of multiple accused.* Severance of multiple accused, if it appears that an accused or the Government is prejudiced by a joint or common trial. In a common trial, a severance shall be granted whenever any accused, other than the moving accused, faces charges unrelated to those charged against the moving accused.”

(bbbb) R.C.M. 906(b)(13) is amended to read as follows:

“(13) *Admissibility.* Preliminary ruling on admissibility of evidence.”

(cccc) R.C.M. 906(b)(14) is amended to read as follows:

“(14) *Mental capacity or responsibility.* Motions relating to mental capacity or responsibility of the accused.”

(dddd) Rule 908(b)(6) is amended to read as follows:

“(6) *Forwarding.* Upon written notice to the military judge under R.C.M. 908(b)(3), the trial counsel shall promptly and by expeditious means forward the appeal to a representative of the Government designated by the Judge Advocate General. The matter forwarded shall include: a statement of the issues appealed; the record of the proceedings or, if preparation of the record has not been completed, a summary of the evidence; and such other matters as the Secretary concerned may prescribe.”

(eeee) Rule 908(b)(7) is amended to read as follows:

“(7) *Appeal filed.*

(A) In cases over which a special trial counsel exercises authority, the decision to appeal shall be made by:

- (i) if within the Department of Defense, a Lead Special Trial Counsel; or
- (ii) if within the Coast Guard, a special trial counsel designated under regulations by the Secretary concerned.

(B) For all other cases, the person designated by the Judge Advocate General shall promptly decide whether to file the appeal with the Court of Criminal Appeals and notify trial counsel of that decision.

(C) If the United States elects to file an appeal, it shall be filed directly with the Court of Criminal Appeals, in accordance with the rules of that court.

(D) In all cases, a representative of the Government designated by the Judge Advocate General will be responsible for the substance and content of submissions to the Court of Criminal Appeals. For appeals in cases over which a special trial counsel exercises authority, the designated representative of the Government will consult with the special trial counsel who authorized the appeal or that special trial counsel's designee concerning the substance and content of appellate filings."

(ffff) R.C.M. 908(c)(3) is amended to read as follows:

"(3) *Action following decision of Court of Criminal Appeals.* After the Court of Criminal Appeals has decided any appeal under Article 62, the accused may petition for review by the Court of Appeals for the Armed Forces, or the Judge Advocate General may certify a case to the Court of Appeals for the Armed Forces. The parties shall be notified of the decision of the Court of Criminal Appeals promptly. If the decision is adverse to the accused, the accused shall be notified of the decision and of the right to petition the Court of Appeals for the Armed Forces for review within 60 days. Such notification shall be made orally on the record at the court-martial or in accordance with R.C.M. 1203(d). If the accused is notified orally on the record, trial counsel shall forward by expeditious means a certificate that the accused was so notified to the Judge Advocate General, who shall forward a copy to the clerk of the Court of Appeals for the Armed Forces when required by the Court. If the decision by the Court of Criminal Appeals

permits it, the court-martial may proceed as to the affected charges and specifications pending further review by the Court of Appeals for the Armed Forces or the Supreme Court, unless either court orders the proceedings stayed. Unless the case is reviewed by the Court of Appeals for the Armed Forces, it shall be returned to the military judge or the convening authority for appropriate action in accordance with the decision of the Court of Criminal Appeals. If the case is reviewed by the Court of Appeals for the Armed Forces, R.C.M. 1204 and 1205 shall apply.

(gggg) R.C.M. 909(c) is revised to read as follows:

“(c) Determination before referral.

(1) For offenses over which special trial counsel has not exercised authority or has deferred, if an inquiry pursuant to R.C.M. 706 conducted before referral concludes that an accused is suffering from a mental disease or defect that renders him or her mentally incompetent to stand trial, the convening authority before whom the charges are pending for disposition may disagree with the conclusion and take any action authorized under R.C.M. 401, including referral of the charges to trial. If that convening authority concurs with the conclusion, the convening authority shall forward the charges to the general court-martial convening authority. If, upon receipt of the charges, the general court-martial convening authority similarly concurs, then the general court-martial convening authority shall commit the accused to the custody of the Attorney General. If the general court-martial convening authority does not concur, that authority may take any action that he or she deems appropriate in accordance with R.C.M. 407, including referral of the charges to trial.

(2) For offenses over which special trial counsel has exercised authority and has not deferred, if an inquiry pursuant to R.C.M. 706 conducted before referral concludes that an accused is suffering from a mental disease or defect that renders him or her mentally

incompetent to stand trial, the general court-martial convening authority may disagree with the conclusion and notify special trial counsel who may take any action authorized under R.C.M. 401A, including referral of charges. If the general court-martial convening authority concurs with the conclusion, that authority shall notify special trial counsel and commit the accused to the custody of the Attorney General.

(3) Upon request of the Government or the accused, a military judge may conduct a hearing to determine the mental capacity of the accused in accordance with R.C.M. 309 and R.C.M. 909(e) at any time prior to referral."

(hhhh) R.C.M. 909(g) is amended to read as follows:

"(g) *Excludable delay.* All periods of commitment shall be excluded as provided by R.C.M. 707(c). The 120-day time period under R.C.M. 707 shall begin anew on the date the general court-martial convening authority takes custody of the accused at the end of any period of commitment. For offenses over which a special trial counsel has exercised authority and not deferred, the general court-martial convening authority shall immediately notify a special trial counsel in accordance with regulations prescribed by the Secretary concerned."

(iiii) R.C.M. 910(a) is amended to read as follows:

"(a) *Types of pleas.*

(1) *In general.* An accused may plead as follows:

(A) guilty;

(B) not guilty of an offense as charged, but guilty of a named lesser included offense;

(C) guilty with exceptions, with or without substitutions, not guilty of the exceptions, but guilty of the substitutions, if any; or

(D) not guilty.”

(jjjj) R.C.M. 911 is amended to read as follows:

“Rule 911. Randomization and assembly of the court-martial panel

(a) Prior to assembly of the court-martial, at an open session of the court-martial, the military judge, or a designee thereof, shall randomly assign numbers to the members detailed by the convening authority.

(b) The military judge shall determine, after accounting for any excusals by the convening authority or designee, how many members detailed by the convening authority must be present at the initial session for which members are required. The required number of members shall be present, according to the randomly assigned order determined pursuant to R.C.M. 911(a). The military judge may temporarily excuse any member who has been detailed but is not required to be present.

(c) At the initial session for which members are required, the military judge shall cause the members who are present to be sworn, account on the record for any members who are temporarily excused, and then announce assembly of the court-martial.

(d) The military judge shall ensure any additional member is sworn at the first court session at which the member is present.”

(kkkk) R.C.M. 912(f)(5) is deleted.

(llll) R.C.M. 912(g) is amended to read as follows:

“(g) *Peremptory challenges.*

(1) *Procedure.* Each party may challenge one member peremptorily. Any member so challenged shall be excused. No party may be required to exercise a peremptory challenge before the examination of members and determination of any challenges for cause have been completed.

Ordinarily, trial counsel shall enter any peremptory challenge before the defense. No member may be impaneled without being subject to peremptory challenge.

(2) *Additional Members.* If members not previously subject to peremptory challenge are required, the procedures in R.C.M. 912(g)(1) shall be followed with respect to such members.

(3) *Waiver.* Failure to exercise a peremptory challenge when properly called upon to do so shall waive the right to make such a challenge. The military judge may, for good cause shown, grant relief from the waiver, but a peremptory challenge may not be made after the presentation of evidence before the members has begun. However, nothing in this subsection shall bar the exercise of a peremptory challenge against a member newly detailed under R.C.M. 505(c)(2)(B), even if presentation of evidence on the merits has begun."

(mmmm) R.C.M. 912A is amended to read as follows:

"Rule 912A. Impaneling members and alternate members

(a) *In general.* After challenges for cause and peremptory challenges are exercised, the military judge of a general or special court-martial with members shall impanel the members based on the order assigned in R.C.M. 911(a), and, if authorized by the convening authority, alternate members, in accordance with the following numerical requirements:

(1) *Capital cases.* In a general court-martial in which the charges were referred with a special instruction that the case be tried as a capital case, the number of members impaneled, subject to R.C.M. 912A(a)(4), shall be twelve.

(2) *General courts-martial.* In a general court-martial other than as described in R.C.M. 912A(a)(1), the number of members impaneled, subject to R.C.M. 912A(a)(4), shall be eight.

(3) *Special courts-martial.* In a special court-martial, the number of members impaneled, subject to R.C.M. 912A(a)(4), shall be four.

(4) *Alternate members.* A convening authority may authorize the military judge to impanel alternate members. When authorized by the convening authority, the military judge shall designate which of the impaneled members are alternate members in accordance with these rules and consistent with the instructions of the convening authority. Alternate members shall not be notified that they are alternate members until they are excused prior to deliberations on findings.

(A) If the convening authority authorizes the military judge to impanel a specific number of alternate members, the number of members impaneled shall be the number of members required under R.C.M. 912A(a)(1), (2), or (3), as applicable, plus the number of alternate members specified by the convening authority. The military judge shall not impanel the court-martial until the specified number of alternate members has been identified. New members may be detailed in order to impanel the specified number of alternate members.

(B) If the convening authority does not authorize the military judge to impanel a specific number of alternate members, and instead authorizes the military judge to impanel alternate members only if, after the exercise of all challenges, excess members remain, the number of members impaneled shall be the number of members required under R.C.M. 912A(a)(1), (2), or (3) and no more than three alternate members. New members shall not be detailed in order to impanel alternate members.

(b) *Enlisted accused.* In the case of an enlisted accused, the members shall be impaneled under R.C.M. 912A(a) in such numbers and proportion that—

(1) If the accused elected to be tried by a court-martial composed of at least one-third enlisted members, the membership of the panel includes at least one-third enlisted members; and

(2) If the accused elected to be tried by a court-martial composed of all officer members, the membership of the panel includes all officer members.

(c) *Number of members insufficient.*

(1) If, after challenges or excusals, the number of detailed members directed to be present by the military judge in accordance with R.C.M. 911(b) is:

(A) fewer than the number of members required for the court-martial under R.C.M. 912A(a), the military judge shall, according to the randomly assigned order determined pursuant to R.C.M. 911(a), determine how many additional detailed members are required and shall direct their presence for member examination in accordance with R.C.M. 912(d).

(B) fewer than the number of members required for the court-martial under R.C.M. 912A(b), the military judge shall, according to the randomly assigned order determined pursuant to R.C.M. 911(a), determine how many additional detailed enlisted members are required and shall direct their presence for member examination in accordance with R.C.M. 912(d).

(2) If, after challenges or excusals, the number of detailed members remaining is fewer than the number of members required for the court-martial under R.C.M. 912A(a) and (b), the convening authority shall detail new members under R.C.M. 503.

(d) *Impaneling members following the exercise of all challenges.* The military judge shall use the following procedures to identify the members who will be impaneled—

(1) In a case in which the accused has elected to be tried by a panel consisting of at least one-third enlisted members under R.C.M. 503(a)(2), the military judge shall:

(A) first identify the one-third enlisted members required under R.C.M. 912A(a) and (b) in numerical order beginning with the lowest random number assigned pursuant to R.C.M. 911(a); and

(B) then identify the remaining members required for the court-martial under

R.C.M. 912A(a) and (b), in numerical order beginning with the lowest random number assigned pursuant to R.C.M. 911(a).

(2) For all other panels, the military judge shall identify the number of members required under R.C.M. 912A(a) and (b) in numerical order beginning with the lowest random number assigned pursuant to R.C.M. 911(a).

(3) If the convening authority:

(A) Authorizes the military judge to impanel a specific number of alternate members, the specified number of alternate members shall be identified in numerical order beginning with the lowest remaining random number assigned pursuant to R.C.M. 911(a), after first identifying members under R.C.M. 912A(d)(1) or (2).

(B) Does not authorize the military judge to impanel a specific number of alternate members, and instead authorizes the military judge to impanel alternate members only if, after the exercise of all challenges, excess members remain, alternate members shall be identified in numerical order beginning with the lowest remaining random number assigned pursuant to R.C.M. 911(a), after first identifying the members under 912A(d)(1) or (2). The military judge shall identify no more than three alternate members.

(C) In a case in which the accused has elected to be tried by a panel consisting of at least one-third enlisted members under R.C.M. 503(a)(2), the convening authority may instruct the military judge to prioritize impaneling a specific number of alternate enlisted members before impaneling alternate officer members. These members shall be identified in numerical order beginning with the lowest remaining random number assigned pursuant to R.C.M. 911(a), after first identifying members under 912A(d)(1).

(4) The military judge shall excuse any members not identified as members or alternate

members, if any.

(e) *Lowest number.* The lowest number is the number with the lowest numerical value.

(f) *Announcement.* After identifying the members to be impaneled in accordance with this rule, and after excusing any excess members, the military judge shall announce that the members are impaneled.”

(nnnn) R.C.M. 912B(a) is amended to read as follows:

“(a) *In general.* Prior to the start of deliberations, a member who has been excused after impanelment shall be replaced in accordance with this rule. Alternate members excused after impanelment shall not be replaced.”

(oooo) R.C.M. 912B(b) is amended to read as follows:

“(b) *Alternate members impaneled.* Prior to the start of deliberations, an excused member shall be replaced with an impaneled alternate member. The alternate member with the lowest random number assigned pursuant to R.C.M. 911(a) shall replace the excused member, unless in the case of an enlisted accused, the use of such member would be inconsistent with the specific panel composition established under R.C.M. 903. Alternate members who have not replaced impaneled members prior to deliberations on findings shall be excused at the time the court closes for deliberations.”

(pppp) A new R.C.M. 912B(d) is inserted immediately after R.C.M. 912B(c) to read as follows:

“(d) *After the start of deliberations.* Once the military judge has closed the court for deliberations, if the number of members is reduced below the requirements of Article 29, trial may not proceed and the military judge shall declare a mistrial.”

(qqqq) R.C.M. 914(e)(1) is amended to read as follows:

“(1) *Party refusal to comply.* If the other party elects not to comply with an order to deliver a statement to the moving party, the military judge shall order that the testimony of the witness be disregarded by the trier of fact and that the trial proceed, or, if it is the Government that elects not to comply, shall declare a mistrial if required in the interest of justice.”

(rrrr) R.C.M. 914A(b) is amended to read as follows:

“(b) *Definition.* As used in this rule, “remote live testimony” includes, but is not limited to, testimony by video teleconference, closed circuit television, or similar technology.”

(ssss) R.C.M. 914B(b) is amended to read as follows:

“(b) *Definition.* As used in this rule, testimony via “remote means” includes, but is not limited to, testimony by video teleconference, closed circuit television, telephone, or similar technology.”

(tttt) R.C.M. 918(a)(1)(B) is amended to read as follows:

“(B) not guilty of an offense as charged, but guilty of a lesser included offense;”.

(uuuu) R.C.M. 920(g) is amended to read as follows:

“(g) *Waiver.* Instructions on a lesser included offense shall not be given when both parties waive such an instruction. After receiving applicable notification of those lesser included offenses of which an accused may be convicted, the parties may waive a lesser included offense instruction. A written waiver is not required. The accused must affirmatively acknowledge that the accused understands the rights involved and affirmatively waive the instruction on the record. The accused’s waiver must be made freely, knowingly, and intelligently. In the case of a joint or common trial, instructions on a lesser included offense shall not be given as to an individual accused when that accused and the Government agree to waive such an instruction.”

(vvvv) R.C.M. 924(c)(2) is amended to read as follows:

“(2) the issue of the finding of guilty of the elements in a finding of not guilty only by reason of lack of mental responsibility at any time before announcement of sentence or, where there was no finding of guilty, entry of judgment.”

(www) R.C.M. 1113(b)(1) is amended to read as follows:

“(1) *Prior to referral.* Prior to referral of charges, the following individuals may examine and disclose sealed materials only if necessary for proper fulfillment of their responsibilities under the UCMJ, this Manual, governing directives, instructions, regulations, applicable rules for practice and procedure, or rules of professional conduct: the judge advocate advising the convening authority who directed the Article 32 preliminary hearing; the convening authority who directed the Article 32 preliminary hearing; the staff judge advocate to the general court-martial convening authority; a military judge detailed to an Article 30a proceeding; the general court-martial convening authority; and special trial counsel for the purposes of making a determination on referral.”

(xxxx) R.C.M. 1202(c) is amended as follows:

“(c) *Counsel in capital cases.* To the greatest extent practicable, in any case in which death is adjudged, at least one appellate defense counsel shall, as determined by the Judge Advocate General, be learned in the law applicable to capital cases. Such counsel may, if necessary, be a civilian, and, if so, may be compensated in accordance with regulations prescribed by the Secretary of Defense or the Secretary of Homeland Security, as applicable.”

(yyyy) R.C.M. 1203(e) is amended to read as follows:

“(e) *Action on cases reviewed by a Court of Criminal Appeals.*

(1) *Forwarding by the Judge Advocate General to the Court of Appeals for the Armed Forces.* The Judge Advocate General may forward the decision of the Court of Criminal Appeals

to the Court of Appeals for the Armed Forces for review with respect to any matter of law. In such a case, the Judge Advocate General shall cause a copy of the decision of the Court of Criminal Appeals and the order forwarding the case to be served on the accused and on appellate defense counsel. While a review of a forwarded case is pending, the Secretary concerned may defer further service of a sentence to confinement that has been ordered executed in such a case.

(2) *Action when findings are set aside.* In a case reviewed by the Court of Criminal Appeals under this rule in which it has set aside the findings and which is not forwarded to the Court of Appeals for the Armed Forces under R.C.M. 1203(e)(1), the Judge Advocate General shall instruct an appropriate authority to take action in accordance with the decision of the Court of Criminal Appeals. If the Court of Criminal Appeals has authorized a rehearing on findings, the record shall be sent to an appropriate referral authority.

(A) If the Court has authorized a rehearing, but the convening authority to whom the record is transmitted finds a rehearing impracticable, the convening authority shall dismiss the charges.

(B) If the Court has authorized a rehearing, but the special trial counsel to whom the record is transmitted finds a rehearing impracticable, special trial counsel shall dismiss the charges.

(3) *Action when sentence is set aside.* In a case reviewed by the Court of Criminal Appeals under this rule in which it has set aside the sentence and which is not forwarded to the Court of Appeals for the Armed Forces under R.C.M. 1203(e)(1), the Judge Advocate General shall instruct an appropriate authority to modify the judgment in accordance with the decision of the Court of Criminal Appeals. If the Court of Criminal Appeals has authorized a rehearing on sentence, the record shall be sent to an appropriate referral authority.

(A) If the convening authority finds a rehearing impracticable, the applicable convening authority shall order either that a sentence of no punishment be imposed or that the applicable charges be dismissed.

(B) If special trial counsel finds a rehearing impracticable, special trial counsel may dismiss the applicable charges. If special trial counsel makes a determination not to dismiss the applicable charges, the convening authority shall order that a sentence of no punishment be imposed.

(4) Action when sentence is affirmed in whole or part.

(A) *Sentence including death.* If the Court of Criminal Appeals affirms any sentence which includes death, the Judge Advocate General shall transmit the record of trial and the decision of the Court of Criminal Appeals directly to the Court of Appeals for the Armed Forces when any period for reconsideration provided by the rules of the Courts of Criminal Appeals has expired.

(B) *Other cases.* If the Court of Criminal Appeals affirms any sentence other than one which includes death, the Judge Advocate General shall cause a copy of the decision of the Court of Criminal Appeals to be served on the accused in accordance with R.C.M. 1203(f).

(5) *Remission or suspension.* If the Judge Advocate General believes that a sentence as affirmed by the Court of Criminal Appeals, other than one which includes death, should be remitted or suspended in whole or part, the Judge Advocate General may, before taking action under R.C.M. 1203(e)(1) or (4), transmit the record of trial and the decision of the Court of Criminal Appeals to the Secretary concerned with a recommendation for action under Article 74 or may take such action as may be authorized by the Secretary concerned under Article 74(a).

(6) *Action when accused lacks mental capacity.* In a review conducted under R.C.M. 1203(b) or (c), the Court of Criminal Appeals may not affirm the proceedings while the accused lacks mental capacity to understand and to conduct or cooperate intelligently in the appellate proceedings. In the absence of substantial evidence to the contrary, the accused is presumed to have the capacity to understand and to conduct or cooperate intelligently in the appellate proceedings. If a substantial question is raised as to the requisite mental capacity of the accused, the Court of Criminal Appeals may direct an examination of the accused in accordance with R.C.M. 706, but the examination may be limited to determining the accused's present capacity to understand and cooperate in the appellate proceedings. The Court may further order a remand under R.C.M. 810(f) as may be necessary. If the record is thereafter returned to the Court of Criminal Appeals, the Court of Criminal Appeals may affirm part or all of the findings or sentence unless it is established, by a preponderance of the evidence—including matters outside the record of trial—that the accused does not have the requisite mental capacity. If the accused does not have the requisite mental capacity, the Court of Criminal Appeals shall stay the proceedings until the accused regains appropriate capacity or take other appropriate action. Nothing in this subsection shall prohibit the Court of Criminal Appeals from making a determination in favor of the accused which will result in the setting aside of a conviction."

(zzzz) R.C.M. 1203(f)(1) is amended to read as follows:

“(1) *Notification of decision.* The accused shall be notified of the decision of the Court of Criminal Appeals in accordance with regulations prescribed by the Secretary concerned.”

(aaaaa) R.C.M. 1204(c)(1) is amended to read as follows:

“(1) *In general.* After it has acted on a case, the Court of Appeals for the Armed Forces may direct the Judge Advocate General to return the record to the Court of Criminal Appeals for

further proceedings in accordance with the decision of the court. Otherwise, unless the decision is subject to review by the Supreme Court, or there is to be further action by the President or the Secretary concerned, the Judge Advocate General shall instruct the appropriate authority to take action in accordance with that decision. If the Court has authorized a rehearing, but the convening authority to whom the record is transmitted finds a rehearing impracticable, the convening authority may dismiss the charges. If a special trial counsel referred the affected charges, the special trial counsel shall determine if a rehearing is impracticable. If a special trial counsel determines a rehearing is impracticable, the special trial counsel shall dismiss the charges.”

(bbbb) R.C.M. 1204(c)(4) amended to read as follows:

“(4) *Decisions subject to review by the Supreme Court.* If the decision of the Court of Appeals for the Armed Forces is subject to review by the Supreme Court, the Judge Advocate General shall take no action under R.C.M. 1204(c)(1), (2), or (3) until:

(A) the time for filing a petition for a writ of certiorari with the Supreme Court has expired; or

(B) the Supreme Court has denied any petitions for writ of certiorari filed in the case.”

(cccc) A new R.C.M. 1204(c)(5) is inserted immediately after R.C.M. 1204(c)(4) to read as follows:

“(5) Upon the occurrence of an event described by R.C.M. 1204(c)(4)(A) or (B), the Judge Advocate General shall take action in accordance with R.C.M. 1204(c)(1), (2), or (3). If the Supreme Court issues a writ of certiorari, the Judge Advocate General shall take action under R.C.M. 1205(b).”

(dddd) R.C.M. 1210(h)(1) is amended to read as follows:

“(1) *Forwarding to appropriate authority.* When a petition for a new trial is granted, the Judge Advocate General shall select and forward the case to an appropriate authority for disposition.”

(eeee) R.C.M. 1301(a) is amended to read as follows:

“(a) *Composition.* A summary court-martial is composed of one commissioned officer on active duty. Unless otherwise prescribed by the Secretary concerned, a summary court-martial shall be of the same armed force as the accused. Summary courts-martial shall be conducted in accordance with the regulations of the military Service to which the accused belongs. Whenever practicable, a summary court-martial should be an officer whose grade is not below lieutenant of the Navy or Coast Guard or captain of the Army, Marine Corps, Air Force, or Space Force. When only one commissioned officer is present with a command or detachment, that officer shall be the summary court-martial of that command or detachment. When more than one commissioned officer is present with a command or detachment, the convening authority may not be the summary court-martial of that command or detachment.”

(fffff) R.C.M. 1301(c)(1) is amended to read as follows:

“(1) Subject to Chapter II and R.C.M. 1301(c)(2), summary courts-martial have the power to try persons subject to the UCMJ, except commissioned officers, warrant officers, cadets, aviation cadets, and midshipmen, for any non-capital offense made punishable by the UCMJ.”

(gggg) R.C.M. 1302(a)(3) is amended to read as follows:

“(3) The commander of a detached squadron or other detachment of the Air Force or a corresponding unit of the Space Force.”

(hhhhh) R.C.M. 1306(b)(3) is amended to read as follows:

“(3) *Action on sentence.* The convening authority shall take action on the sentence. The convening authority may approve the sentence as adjudged or disapprove, commute, or suspend, in whole or in part, any portion of an adjudged sentence. The convening authority shall approve the sentence that is warranted by the circumstances of the offense and appropriate for the accused.”

Section 3. Part III of the Manual for Courts-Martial, United States, is amended as follows:**(a) Mil. R. Evid. 505(f)(4) is amended to read as follows:**

“(4) *Convening Authority and Special Trial Counsel Notice and Action.* If a claim of privilege has been made under this rule with respect to classified information that apparently contains evidence that is relevant and necessary to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence in the court-martial proceeding, the matter must be reported to the convening authority and special trial counsel, as applicable.

(A) The convening authority may institute action to obtain the classified information for use by the military judge in making a determination under Mil. R. Evid. 505(j).

(B) The convening authority or special trial counsel, as applicable, may:

(i) dismiss the charges;

(ii) dismiss the charges or specifications or both to which the information relates; or

(iii) take such other action as may be required in the interests of justice.”

(b) Mil. R. Evid. 506(f)(4) is amended to read as follows:

“(4) *Convening Authority and Special Trial Counsel Notice and Action.* If a claim of privilege has been made under this rule with respect to government information that apparently contains evidence that is relevant and necessary to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence in the court-martial proceeding, the matter must be reported to the convening authority and special trial counsel, as applicable.

(A) The convening authority may institute action to obtain the information for use by the military judge in making a determination under Mil. R. Evid. 505(j);

(B) The convening authority or special trial counsel, as applicable, may:

(i) dismiss the charges;

(ii) dismiss the charges or specifications or both to which the information relates; or

(iii) take such other action as may be required in the interests of justice.”

(c) Mil. R. Evid. 507(e)(3) is amended to read as follows:

“(3) *Action by the Convening Authority or Special Trial Counsel.* If the military judge determines that disclosure of the identity of the informant is required under the standards set forth in this rule, and the prosecution elects not to disclose the identity of the informant, the matter must be reported to the convening authority. The convening authority or the special trial counsel, as applicable, may institute action to secure disclosure of the identity of the informant, terminate the proceedings, or take such other action as may be appropriate under the circumstances.”

Section 4. Part IV of the Manual for Courts-Martial, United States, is amended as follows:

(a) Paragraph 77.b.(4)(d)(ii) is amended to read as follows:

“(ii) That the accused did so by strangulation or suffocation; and”.

(b) Paragraph 77.d.(1)(b) is amended to read as follows:

“(b) *When committed with a firearm or other dangerous weapon.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.”

Section 5. Part V of the Manual for Courts-Martial, United States, is amended as follows:**(a) Paragraph 1.h. is amended to read as follows:**

“h. *Burden of proof.* The burden of proof to be utilized by commanders throughout the nonjudicial punishment process shall be a preponderance of the evidence. This means the commanding officer must determine it is “more likely than not” the member committed the offense defined by the UCMJ. Each element of each offense, as defined in the Manual for Courts-Martial, must be supported by a preponderance of the evidence (*i.e.*, “more likely than not”). This standard is more rigorous than a “probable cause” standard of proof used by law enforcement to obtain a warrant but a lower standard of proof than the “beyond a reasonable doubt” standard used at a court-martial.”

Section 6. Appendix 12A of the Manual for Courts-Martial, United States, is revised to read as follows:**“PRESIDENTIALLY-PRESCRIBED LESSER INCLUDED OFFENSES PURSUANT TO ARTICLE 79(b)(2), UNIFORM CODE OF MILITARY JUSTICE”**

This authoritative list provides actual notice of factually similar lesser included offenses designated by the President, pursuant to Article 79(b)(2), that are “reasonably included” in the greater offense. The military justice system has unique, but closely related, military offenses, which are not “necessarily included” lesser offenses under the “elements test.” *See United States v. Teters*, 37 M.J. 370 (C.A.A.F. 1993); *see also United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2009). This list is exhaustive as to those lesser included offenses (called “reasonably included

offenses" in the chart below) that the President has designated pursuant to Article 79(b)(2).

However, this list is not intended to address, and does not address, those offenses that are necessarily included in a charged offense and are therefore lesser included offenses pursuant to Article 79(b)(1).

Article	Offense (Part IV Citation)	Reasonably Included Offense (RIO) Article	RIO (Part IV Citation)
85 - Desertion	Para. 9.b.(1)-(3)	85 - Desertion	Para. 9.b.(4)
87a - Resistance, flight, breach of arrest, and escape	Par. 12.b.(5)	86 - Absent without leave	Para. 10.b.(3)
87b - Offenses against correctional custody and restriction	Para. 13.b.(1)	86 - Absent without leave	Para. 10.b.(3)
93a - Prohibited activities with military recruit or trainee by person in position of special trust	Para. 20.b.(1); 20.b.(2)	93 - Cruelty and maltreatment	Para. 19.b.
94 - Mutiny or sedition	Para. 21.b.(1)	94 - Mutiny or sedition	Para. 21.b.(6)
100 - Subordinate compelling surrender	Para. 28.b.(1)	100 - Subordinate compelling surrender	Para. 28.b.(2)
103a - Espionage	Para. 32.b.(1)	103a - Espionage	Para. 32.b.(2)
103b - Aiding the enemy	Para. 33.b.(1)	103b - Aiding the enemy	Para. 33.b.(2)
104b - Unlawful enlistment, appointment, or separation	Para. 36.b.	107- False official statements; false swearing	Para. 41.b.(1)
118 - Murder	Para. 56.b.(1); 56.b.(2); 56.b.(3); 56.b.(4)	114 - Endangerment Offenses	Para. 52.b.(1)
119 - Manslaughter	Para. 57.b.(1)	114 - Endangerment Offenses	Para. 52.b.(1)
119a - Death or injury of an unborn child	Para. 58.b.(2); 58.b.(4)	119a - Death or injury of an unborn child	Para. 58.b.(3)
120 - Rape and Sexual Assault	Para. 60.b.(1)	128 - Assault with intent to commit specified offenses (rape)	Para. 77.b.(3)

120 - Rape and Sexual Assault	Para. 60.b.(2)	128 - Assault with intent to commit specified offenses (sexual assault)	Para. 77.b.(3)
120b - Rape of a child	Para. 62.b.(1)	128 - Assault with intent to commit specified offenses (rape of a child)	Para. 77.b.(3)
120b - Rape of a child	Para. 62.b.(2)	128 - Assault with intent to commit specified offenses (sexual assault of a child)	Para. 77.b.(3)
128 - Assault	Para. 77.b.(2); 77.b.(3); 77.b.(4); 77.b.(5)	128 - Assault	Para. 77.b.(1)
134 - Check, worthless making and uttering by dishonorably failing to maintain funds	Para. 94.b.	134 - Debt, dishonorably failing to pay	Para. 96.b.
134 - Child pornography	Para. 95.b.(1); 95.b.(2); 95.b.(3); 95.b.(4)	134 - Indecent conduct	Para. 104.b.
134 - Disloyal statements	Para. 97.b.	88 - Contempt toward officials	Para. 14.b.

”

ANNEX 3**Section 1. Part II of the Manual for Courts-Martial, United States, is amended as follows:****(a) R.C.M. 502(a)(2)(A) is amended to read as follows:**

“(A) *Members.* The members of a court-martial shall determine whether the accused is proved guilty and, in a capital case in which the accused is unanimously found guilty of a capital offense, the members shall make a determination in accordance with Article 53(c)(1)(A). Each member has an equal voice and vote with other members in deliberating upon and deciding all matters submitted to them. No member may use rank or position to influence another member. No member of a court-martial may have access to or use in any open or closed session this Manual, reports of decided cases, or any other reference material.”

(b) R.C.M. 902A is deleted.**(c) R.C.M. 906(b)(12)(B) is amended to read as follows:**

“(B) *As applied to sentence.* Where the military judge finds that the unreasonable multiplication of charges requires a remedy that focuses more appropriately on punishment than on findings, the military judge may find that there is an unreasonable multiplication of charges as applied to sentence. If the military judge makes such a finding, the remedy shall be as set forth in R.C.M. 1002(d)(2). A ruling on this motion ordinarily should be deferred until after findings are entered.”

(d) A new R.C.M. 925 is inserted immediately after R.C.M. 924 to read as follows:**“Rule 925. Application of sentencing rules**

(a) Only one set of sentencing rules shall apply in a court-martial.

(b) If convicted of any offense for which death may be adjudged, the accused shall be sentenced in accordance with R.C.M. 1004.

(c) Except as provided in R.C.M. 925(b):

(1) If convicted of any offense committed on or before December 27, 2023, the accused shall be sentenced in accordance with the Rules for Courts-Martial in effect prior to December 28, 2023. The military judge shall inquire into the accused's election of sentencing rules after the announcement of findings and before any matter is presented in the presentencing phase.

(2) If convicted of only offenses committed after December 27, 2023, the accused shall be sentenced by a military judge in accordance with R.C.M. 1002(a)(2).

(d) Any elections made by the accused pursuant to R.C.M. 925(c)(1) shall be made orally on the record or be in writing and signed by the accused. The military judge shall ascertain whether the accused has consulted with defense counsel and has been informed of the right to make the election of the applicable sentencing rules."

(e) R.C.M. 1001(a)(1) is amended to read as follows:

"(1) *Procedure.* After findings of guilty have been announced, the Government and defense may present matters pursuant to this rule to aid the court-martial in determining an appropriate sentence. Such matters shall ordinarily be presented in the following sequence:

(A) Presentation by the trial counsel of:

(i) service data relating to the accused taken from the charge sheet;
(ii) personal data relating to the accused and of the character of the accused's prior service as reflected in the personnel records of the accused.

(B) Crime victim's right to be reasonably heard.

(C) Presentation by the defense of evidence in extenuation or mitigation or both.

(D) Rebuttal.

(E) Argument by the trial counsel on sentence.

(F) Argument by the defense counsel on sentence.

(G) Rebuttal argument in the discretion of the military judge.”

(f) R.C.M. 1001(b)(2) is amended to read as follows:

“(2) *Personal data and character of prior service of the accused.* Under regulations of the Secretary concerned, the trial counsel may obtain and introduce from the personnel records of the accused evidence of the accused’s marital status; number of dependents, if any; and character of prior service. Such evidence includes copies of reports reflecting the past military efficiency, conduct, performance, and history of the accused and evidence of any disciplinary actions, including punishments under Article 15 and summary courts-martial after review has been completed pursuant to Article 64. “Personnel records of the accused” includes any records made or maintained in accordance with departmental regulations that reflect the past military efficiency, conduct, performance, and history of the accused. If the accused objects to a particular document as inaccurate or incomplete in a specified respect, or as containing matter that is not admissible under the Military Rules of Evidence, the matter shall be determined by the military judge. Objections not asserted are forfeited.”

(g) R.C.M. 1001(b)(3)(B) is amended to read as follows:

“(B) *Pendency of appeal.* The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.”

(h) R.C.M. 1001(b)(4) is amended to read as follows:

“(4) *Evidence in aggravation.* The trial counsel may present evidence as to any aggravating circumstance directly relating to or resulting from the offenses of which the accused has been found guilty. Evidence in aggravation includes, but is not limited to, evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was

the victim of an offense committed by the accused and evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense. In addition, evidence in aggravation may include evidence that the accused intentionally selected any victim or any property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, sex (including pregnancy), gender (including gender identity), disability, or sexual orientation of any person. Except in capital cases, a written or oral deposition taken in accordance with R.C.M. 702 is admissible in aggravation."

(i) R.C.M. 1001(c) is amended to read as follows:

“(c) *Crime victim's right to be reasonably heard.*

(1) *In general.* After presentation by the trial counsel, a crime victim of an offense of which the accused has been found guilty has the right to be reasonably heard at the presentencing proceeding relating to that offense. A crime victim who makes an unsworn statement under R.C.M. 1001(c)(5) is not considered a witness for the purposes of Article 42(b). If the crime victim exercises the right to be reasonably heard, the crime victim shall be called by the court-martial. The exercise of the right is independent of whether the crime victim testified during findings or is called to testify by the Government or defense under this rule.

(2) Definitions.

(A) *Crime victim.* For purposes of R.C.M. 1001(c), a crime victim is an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense of which the accused was found guilty or the individual's lawful representative or designee appointed by the military judge under these rules.

(B) *Victim impact.* For purposes of R.C.M. 1001(c), victim impact includes any financial, social, psychological, or medical impact on the crime victim relating to or arising from the offense of which the accused has been found guilty.

(C) *Mitigation.* For the purposes of R.C.M. 1001(c), mitigation includes any matter that may lessen the punishment to be adjudged by the court-martial or furnish grounds for a recommendation of clemency.

(D) *Right to be reasonably heard.*

(i) *Capital cases.* In capital cases, for purposes of R.C.M. 1001(c), the “right to be reasonably heard” means the right to make a sworn statement. The statement may not recommend a specific sentence.

(ii) *Noncapital cases.* In noncapital cases, for purposes of R.C.M. 1001(c), the “right to be reasonably heard” means the right to make a sworn statement, an unsworn statement, or both. This right includes the right to be heard on any objection to any unsworn statement.

(3) *Contents of statement.* The content of statements made under R.C.M. 1001(c)(4) or (5) may only include victim impact and matters in mitigation, except that, in a noncapital case, the victim may recommend a specific sentence.

(4) *Sworn statement.* The crime victim may make a sworn statement and shall be subject to cross-examination concerning it by the trial counsel and the defense counsel or examination on it by the court-martial.

(5) *Unsworn statement.* The crime victim may make an unsworn statement and may not be cross-examined by the trial counsel or the defense counsel or examined upon it by the court-martial. The Government or defense may, however, rebut any statements of fact therein. The

unsworn statement may be oral, written, or both, and may be made by the crime victim, by counsel representing the crime victim, or both.

(j) R.C.M. 1001(f)(1) is amended to read as follows:

“(1) *In general.* During the presentencing proceedings, there shall be much greater latitude than on the merits to receive information by means other than testimony presented through the personal appearance of witnesses. During presentencing proceedings, a dispute as to the production of a witness at Government expense is a matter within the discretion of the military judge to resolve subject to the limitations in R.C.M. 1001(f)(2).”

(k) R.C.M. 1001(f)(2)(C) is amended to read as follows:

“(C) the other party refuses to enter into a stipulation containing the matters to which the witness is expected to testify, except in an extraordinary case when such a stipulation would be an insufficient substitute for the testimony;”.

(l) R.C.M. 1001(h) is amended as follows:

“(h) *Argument.* After introduction of matters relating to the sentence under this rule, counsel for the Government and defense may argue for an appropriate sentence. The trial counsel may not in argument purport to speak for the convening authority or any other higher authority or refer to the views of such authorities or any policy directive relative to punishment or to any punishment or quantum of punishment greater than the court-martial may adjudge. The trial counsel may, however, recommend a specific lawful sentence and may also refer to the sentencing considerations set forth in R.C.M. 1002(f). Failure to object to improper argument before the military judge begins deliberations, or before the military judge instructs the members on sentencing, shall constitute forfeiture of the objection.”

(m) R.C.M. 1002 is amended to read as follows:

“Rule 1002. Sentencing determination

(a) *Generally.* Subject to limitations in this Manual, the sentence to be adjudged is a matter within the discretion of the court-martial. A court-martial may adjudge any punishment authorized in this Manual in order to achieve the purposes of sentencing under R.C.M. 1002(c), including the maximum punishment or any lesser punishment, or may adjudge a sentence of no punishment except as outlined below.

(1) *Mandatory minimum.* Unless otherwise authorized, when a mandatory minimum sentence is prescribed by the UCMJ, the sentence for an offense shall include any punishment that is made mandatory by law for that offense. The sentence for an offense may not be greater than the maximum sentence established by law or by the President for that offense.

(2) *Parameters and criteria.*

(A) When an offense is subject to sentencing criteria, the military judge shall consider the applicable sentencing criteria in determining the sentence for that offense.

(B) When an offense is subject to sentencing parameters, the military judge shall sentence the accused for that offense within the applicable parameter, unless the military judge finds specific facts that warrant a sentence outside the applicable parameter. If the military judge imposes a sentence outside a sentencing parameter, the military judge shall include in the record a written statement of the factual basis for the sentence.

(3) If the military judge accepts a plea agreement with a sentence limitation, the court-martial shall sentence the accused in accordance with the limits established by the plea agreement. Subject to Article 53a(c), the military judge shall accept a plea agreement submitted by the parties, except that—

(A) in the case of an offense with a sentencing parameter, the military judge may

reject a plea agreement that proposes a sentence that is outside the sentencing parameter if the military judge determines that the proposed sentence is plainly unreasonable; and

(B) in the case of an offense for which there is no sentencing parameter, the military judge may reject a plea agreement that proposes a sentence if the military judge determines that the proposed sentence is plainly unreasonable.

(b) *Noncapital cases.* The military judge shall determine the sentence of a general or special court-martial in accordance with this subsection in all noncapital cases.

(1) *Segmented sentencing for confinement and fines.* The military judge at a general or special court-martial shall determine an appropriate term of confinement and fine, if applicable, for each specification for which the accused was found guilty. Subject to R.C.M. 1002(a), such a determination may include a term of no confinement or no fine when appropriate for the offense.

(2) *Special court-martial.* The military judge shall, in a special court-martial, to the extent necessary, reduce the total confinement to the maximum confinement authorized under R.C.M. 201(f)(2).

(3) *Unitary sentencing for other forms of punishment.* All punishments other than confinement or a fine available under R.C.M. 1003, if any, shall be determined as a single, unitary component of the sentence, covering all of the guilty findings in their entirety. The military judge shall not segment those punishments among the guilty findings.

(c) *Imposition of sentence.* In sentencing an accused under this rule, the court-martial shall impose punishment that is sufficient, but not greater than necessary, to promote justice and to maintain good order and discipline in the United States Armed Forces, taking into consideration—

(1) the nature and circumstances of the offense and the history and characteristics of the

accused;

(2) the impact of the offense on—

(A) the financial, social, psychological, or medical well-being of any victim of the offense; and

(B) the mission, discipline, or efficiency of the command of the accused and any victim of the offense;

(3) the need for the sentence to—

(A) reflect the seriousness of the offense;

(B) promote respect for the law;

(C) provide just punishment for the offense;

(D) promote adequate deterrence of misconduct;

(E) protect others from further crimes by the accused;

(F) rehabilitate the accused; and

(G) provide, in appropriate cases, the opportunity for retraining and returning to duty to meet the needs of the service; and

(4) the sentences available under these rules.

(d) *Information that may be considered.* The court-martial, in applying the factors listed in R.C.M. 1002(c) to the facts of a particular case, may consider—

(1) Any evidence admitted by the military judge during the presentencing proceeding under R.C.M. 1001; and

(2) Any evidence admitted by the military judge during the findings proceeding.”

(n) R.C.M. 1003(b)(5) is amended to read as follows:

“(5) *Restriction to specified limits.* Restriction may be adjudged for no more than 2

months. Confinement and restriction may be adjudged in the same case, but they may not together exceed the maximum authorized period of confinement.”

(o) R.C.M. 1003(c)(1)(A)(i) is amended to read as follows:

“(i) *Maximum punishment.* The maximum limits for the authorized punishments of confinement, forfeitures, and punitive discharge (if any) are set forth for each offense listed in Part IV of this Manual. These limitations are for each separate offense, not for each charge, and apply notwithstanding any applicable sentencing parameter. When a dishonorable discharge is authorized, a bad-conduct discharge is also authorized.”

(p) R.C.M. 1003(c)(1)(B) is amended to read as follows:

“(B) *Offenses not listed in Part IV.*

(i) *Included or closely related offenses.* For an offense not listed in Part IV of this Manual that is included in or closely related to an offense listed therein, the maximum punishment and the sentencing parameter or criteria shall be that or those of the offense listed; however, if an offense not listed is included in a listed offense, and is closely related to another or is equally closely related to two or more listed offenses, the maximum punishment and the sentencing parameter or criteria shall be the same as that or those of the least severe of the listed offenses.

(ii) *Not included or closely related offenses.* An offense not listed in Part IV and not included in or closely related to an offense listed therein is punishable as authorized by the United States Code or as authorized by the custom of the applicable service. When the United States Code provides for confinement for a specified period or not more than a specified period, the maximum punishment by court-martial shall include confinement for that period. If the period is 1 year or longer, the maximum punishment by court-martial also includes a

dishonorable discharge and forfeiture of all pay and allowances; if the period is 6 months or more but less than 1 year, the maximum punishment by court-martial also includes a bad-conduct discharge and forfeiture of all pay and allowances; if the period is less than 6 months, the maximum punishment by court-martial also includes forfeiture of two-thirds pay per month for the authorized period of confinement.”

(q) R.C.M. 1004 is revised to read as follows:

“Rule 1004. Capital cases

(a) *In general.* In addition to the provisions in R.C.M. 1001, the provisions in this rule shall apply in capital cases. Death may be adjudged only when—

(1) Death is expressly authorized under Part IV of this Manual for an offense of which the accused has been found guilty or is authorized under the law of war for an offense of which the accused has been found guilty under the law of war;

(2) The accused was properly notified that the case would be tried as a capital case and was properly notified of the aggravating factors the Government intended to prove;

(3) The accused was convicted of such an offense by either—

(A) the unanimous vote of all twelve members of the court-martial; or

(B) the military judge pursuant to the accused’s plea of guilty to such an offense;

(4) The members unanimously find that at least one of the aggravating factors under R.C.M. 1004(c) existed beyond a reasonable doubt for that offense and notice of such factor was provided in accordance with R.C.M. 1004(b);

(5) The members unanimously find that the extenuating and mitigating circumstances are substantially outweighed by any aggravating circumstances, including any relevant aggravating factor(s); and

(6) The members unanimously determine that the sentence for that offense shall be death.

(b) *Notice.*

(1) *Referral.* The referral authority shall indicate that the case is to be tried as a capital case by including a special instruction on the charge sheet. Failure to include this special instruction at the time of the referral shall not bar the referral authority from later adding the required special instruction, provided that—

(A) the referral authority has otherwise complied with the notice requirement of R.C.M. 1004(b)(2); and

(B) if the accused demonstrates specific prejudice from such failure to include the special instruction, the military judge determines that a continuance or a recess is an adequate remedy.

(2) *Arraignment.* Before arraignment, the trial counsel shall give the defense written notice of which specific aggravating factor(s) under R.C.M. 1004(c) the Government intends to prove and to which offense(s) the aggravating factor(s) apply. Failure to provide timely notice under this subsection of any aggravating factors under R.C.M. 1004(c) shall not bar later notice and proof of such additional aggravating factors unless the accused demonstrates specific prejudice from such failure and that a continuance or a recess is not an adequate remedy.

(c) *Aggravating factors.* The trial counsel may present evidence in accordance with R.C.M. 1001(b)(4) tending to establish one or more of the aggravating factors enumerated below. Death may be adjudged only if the members find, beyond a reasonable doubt, one or more of the following aggravating factors:

(1) That the offense was committed before or in the presence of the enemy, except that this factor shall not apply in the case of a violation of Article 118;

(2) That in committing the offense the accused—

(A) Knowingly created a grave risk of substantial damage to the national security of the United States; or

(B) Knowingly created a grave risk of substantial damage to a mission, system, or function of the United States, provided that this subparagraph shall apply only if substantial damage to the national security of the United States would have resulted had the potential damage been effected;

(3) That the offense caused substantial damage to the national security of the United States, regardless of whether the accused intended such damage, except that this factor shall not apply in case of a violation of Article 118;

(4) That the offense was committed in such a way or under such circumstances that the life of one or more persons other than the victim was unlawfully and substantially endangered, except that this factor shall not apply to a violation of Articles 103a or 103b;

(5) That the accused committed the offense with the intent to avoid hazardous duty;

(6) That, only in the case of a violation of Article 118, the offense was committed in time of war and in territory in which the United States or an ally of the United States was then an occupying power or in which the United States Armed Forces were then engaged in active hostilities;

(7) That, only in the case of a violation of Article 118(1)—

(A) The accused was serving a sentence of confinement for 30 years or more or for life at the time of the murder;

(B) The murder was committed while the accused was engaged in the commission or attempted commission of a separate murder, or any robbery, rape, rape of a child, sexual

assault, sexual assault of a child, aggravated sexual contact, sexual abuse of a child, aggravated arson, burglary, kidnapping, mutiny, sedition, or piracy of an aircraft or vessel; or while the accused was engaged in the commission or attempted commission of any offense involving the wrongful distribution, manufacture, or introduction or possession, with intent to distribute, of a controlled substance; or, while the accused was engaged in flight or attempted flight after the commission or attempted commission of any offense listed in this subparagraph (R.C.M. 1004(c)(7)(B)).

(C) The murder was committed for the purpose of receiving money or a thing of value;

(D) The accused procured another by means of compulsion, coercion, or a promise of an advantage, a service, or a thing of value to commit the murder;

(E) The murder was committed with the intent to avoid or to prevent lawful apprehension or effect an escape from custody or confinement;

(F) The victim was the President of the United States; the President-elect; the Vice President, or, if there was no Vice President, the next officer in the order of succession to the office of President of the United States; the Vice President-elect; any individual who is acting as President under the Constitution and laws of the United States; a Member of Congress (including a Delegate to, or Resident Commissioner in, the Congress) or Member of Congress-elect; a justice or judge of the United States; a chief of state or head of government (or the political equivalent) of a foreign nation; or a foreign official (as such term is defined in 18 U.S.C. § 1116(b)(3)(A)), if the official was on official business at the time of the offense and was in the United States or in a place described in Mil. R. Evid. 315(c)(2) or (c)(3);

(G) The accused then knew that the victim was any of the following persons in the execution of office: a commissioned, warrant, noncommissioned, or petty officer of the United States Armed Forces; a member of any law enforcement or security activity or agency, military or civilian, including correctional custody personnel; or any firefighter;

(H) The murder was committed with intent to obstruct justice;

(I) The murder was preceded by the intentional infliction of substantial physical harm or prolonged, substantial mental or physical pain and suffering to the victim. For purposes of this section, “substantial physical harm” means fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, or other serious bodily injuries. The term “substantial physical harm” does not mean minor injuries, such as a black eye or bloody nose. The term “substantial mental or physical pain and suffering” is accorded its common meaning and includes torture.

(J) The accused has been found guilty in the same case of another violation of Article 118;

(K) The victim of the murder was under 15 years of age;

(8) That, only in the case of a violation of Article 118(4), the accused was the actual perpetrator of the killing or was a principal whose participation in the burglary, rape, rape of a child, sexual assault, sexual assault of a child, aggravated sexual contact, sexual abuse of a child, robbery, or aggravated arson was major and who manifested a reckless indifference for human life.

(9) [Reserved]

(10) That, only in the case of a violation of the law of war, death is authorized under the law of war for the offense;

(11) That, only in the case of a violation of Article 103, 103a, or 103b—

(A) The accused has been convicted of another offense involving espionage, spying, or treason for which either a sentence of death or imprisonment for life was authorized by statute; or

(B) That in committing the offense, the accused knowingly created a grave risk of death to a person other than the individual who was the victim.

For purposes of R.C.M. 1004, “national security” means the national defense and foreign relations of the United States and specifically includes a military or defense advantage over any foreign nation or group of nations; a favorable foreign relations position; or a defense posture capable of successfully resisting hostile or destructive action from within or without.

(d) *Evidence in extenuation and mitigation.* The accused shall be given broad latitude to present evidence in extenuation and mitigation.

(e) *Basis for findings.* The findings specified by R.C.M. 1004(a)(4) and (a)(5) may be based on evidence introduced before or after findings under R.C.M. 921, or both.

(f) *Instructions.* Instructions shall be given after arguments by counsel and before the members close to deliberate on sentence, but the military judge may, upon request of the members, any party, or *sua sponte*, give additional instructions at a later time.

(1) *Requests for instructions.* During presentencing proceedings or at such other time as the military judge may permit, any party may request that the military judge instruct the members on the law as set forth in the request. The military judge may require the requested instruction to be written. Each party shall be given the opportunity to be heard on any proposed instruction before it is given. The military judge shall inform the parties of the proposed action on such requests before their arguments to the members.

(2) *How given.* Instructions shall be given orally on the record in the presence of all parties and the members. Written copies of the instructions or, unless a party objects, portions of them may also be given to the members for their use during deliberations.

(3) *Required instructions.* Instructions shall include—

- (A) The charge(s) and specification(s) for which the members shall make a sentencing determination;
- (B) The applicable aggravating factor or factors under R.C.M. 1004(c) and to which charge(s) and specification(s) the aggravating factor or factors apply;
- (C) A statement of the procedures for deliberation and voting set out in R.C.M. 1004(g);
- (D) A statement informing the members that they are solely responsible for selecting an appropriate determination and may not rely on the possibility of any mitigating action by the convening or higher authority;
- (E) A statement that the members should consider all matters in aggravation, whether introduced before or after findings, and matters introduced under R.C.M. 1001(b)(1), (2), (3), and (5);
- (F) A statement that the members may consider:
 - (i) Any evidence admitted by the military judge during the presentencing proceeding under R.C.M. 1001; and
 - (ii) Any evidence admitted by the military judge during the findings proceeding;
- (G) A statement that the members shall consider all evidence in extenuation and mitigation before a sentence of death may be determined; and

(H) Such other explanations, descriptions, or directions that the military judge determines to be necessary, whether properly requested by a party or determined by the military judge *sua sponte*.

(4) *Failure to object.* After being afforded an opportunity to object, failure to object to an instruction or to omission of an instruction before the members close to deliberate shall constitute waiver of the objection. The military judge may require the party objecting to specify in what respect the instructions were improper. The parties shall be given the opportunity to be heard on any objection outside the presence of the members.

(g) *Deliberations and voting.*

(1) *In general.* With respect to each charge and specification for which a sentence of death may be determined, the members shall deliberate and vote after the military judge instructs the members. Only the members shall be present during deliberations and voting. Superiority in rank shall not be used in any manner to control the independence of members in the exercise of their judgment.

(2) *Deliberations.* Deliberations require a full and free discussion of the determination to be made in the case. Unless otherwise directed by the military judge, members may take with them in deliberations their notes, if any; any exhibits admitted in evidence; and any written instructions. Members may request that the court-martial be reopened and that portions of the record be read to them or additional evidence introduced. The military judge may, in the exercise of discretion, grant such requests.

(3) *Voting generally.*

(A) *Duty of members.* Each member has the duty to vote on the necessary findings described in R.C.M. 1004(a)(4)-(6) as applicable. No member may abstain from voting.

(B) *Secret ballot.* Voting shall be by secret written ballot.

(4) *Procedure.*

(A) *Initial process.* The members shall employ the following process for each charge and specification for which death may be determined.

(i) The members shall vote separately on each aggravating factor under R.C.M. 1004(c) that applies to the offense and on which the members have been instructed. The members shall not proceed to R.C.M. 1004(g)(4)(A)(ii) unless the members unanimously find that at least one of the aggravating factors existed beyond a reasonable doubt.

(ii) The members shall vote on whether the extenuating and mitigating circumstances are substantially outweighed by any aggravating circumstances, including any relevant aggravating factor(s) under R.C.M. 1004(c). The members shall not proceed to R.C.M. 1004(g)(4)(B) unless the members unanimously find that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances.

(B) *Voting on a sentencing determination if death may be adjudged.*

(i) If the members unanimously find both that at least one aggravating factor exists and that the extenuating and mitigating circumstances are substantially outweighed by the aggravating circumstances, the members shall vote on the following sentencing determinations, which shall be binding on the military judge. Except as permitted under R.C.M. 1004(i), the members must vote on potential sentence determinations in the order listed below. The members must vote on each option separately from the other option, considering only one option at a time. During the voting on a particular option, each member may cast one vote for or against that option. The order of the options to be considered is:

(I) Death; or

(II) Life in prison without eligibility for parole.

(ii) If all 12 members vote for death, the sentencing determination of the members shall be death. If any member does not vote for death, the sentencing determination of the members shall not be death.

(iii) If the members' initial vote does not reach the required unanimous consensus for death, the members shall vote on life in prison without eligibility for parole. If three-fourths or more of the members vote for life in prison without eligibility for parole, the sentencing determination of the members shall be life in prison without eligibility for parole.

(iv) If the members' vote does not reach three-fourths for life in prison without eligibility for parole, the offense shall be returned to the military judge for imposition of a sentence of a lesser punishment in accordance with R.C.M. 1001.

(C) *Voting on a sentencing determination if death may not be adjudged.*

(i) If the members do not unanimously find that at least one aggravating factor exists or the members do not unanimously find that the aggravating circumstances substantially outweigh the extenuating and mitigating circumstances, the members shall vote on life in prison without eligibility for parole.

(ii) If the members' vote does not reach three-fourths for life in prison without eligibility for parole, the offense shall be returned to the military judge for imposition of a sentence of a lesser punishment in accordance with R.C.M. 1001.

(D) *Counting votes.* The junior member shall collect the ballots and count the votes. The president shall check the count and inform the other members of the result.

(h) *Action after a sentence is reached.* After the members have agreed upon a determination by the required number of votes in accordance with this rule, the court-martial shall be opened, and

the president shall inform the military judge that the members have reached a determination. The military judge may, in the presence of the parties, examine any writing used by the president to state the determination and may assist the members in putting the determination in proper form. If the members voted unanimously for a determination of death, the writing shall indicate which aggravating factor or factors under R.C.M. 1004(c) the members unanimously found to exist beyond a reasonable doubt. Neither that writing nor any oral or written clarification or discussion concerning it shall constitute announcement of the determination.

(i) *Reconsideration.* Subject to this rule, a sentence may be reconsidered at any time before it is announced in open session of the court.

(1) *Clarification of determination.* A sentence determination may be clarified at any time before entry of judgment. When a determination by the members in a capital case is ambiguous, the military judge shall bring the matter to the attention of the members if the matter is discovered before the court-martial is adjourned. If the matter is discovered after adjournment, the military judge may call a session for clarification by the members as soon as practicable after the ambiguity is discovered, or the military judge may resolve the ambiguity.

(2) *Action by the convening authority.*

(A) Prior to entry of judgment, if a convening authority becomes aware that the sentence of the court-martial is ambiguous, the convening authority shall return the matter to the court-martial for clarification. When the sentence of the court-martial appears to be illegal, the convening authority shall return the matter to the court-martial for correction.

(B) Prior to entry of judgment in a case in which a special trial counsel has exercised authority—

(i) if the special trial counsel becomes aware that the sentence of a court-martial is ambiguous, the special trial counsel shall make a binding determination that the convening authority return the matter to the court-martial for clarification; or

(ii) if the sentence of the court-martial appears to be illegal, the special trial counsel shall make a binding determination that the convening authority shall return the matter to the court-martial for correction.

(3) *Reconsideration procedure.* Any member of the court-martial may propose that a determination of the members in a capital case be reconsidered.

(A) *Instructions.* When reconsideration has been requested, the military judge shall instruct the members on the procedure for reconsideration.

(B) *Voting.* The members shall vote by secret written ballot in closed session whether to reconsider a determination.

(C) *Number of votes required for aggravating factors in capital cases.* Members may reconsider a unanimous vote under R.C.M. 1004(g)(4)(A) (i) that an aggravating factor was proven beyond a reasonable doubt if at least one member votes to reconsider. Members may reconsider a unanimous vote under R.C.M. 1004(g)(4)(A)(ii) that any extenuating and mitigating circumstances are substantially outweighed by any aggravating circumstances admissible under R.C.M. 1001(b)(4), including the factors under R.C.M. 1004(c), if at least one member votes to reconsider. In all other circumstances, a vote under R.C.M. 1004(g)(4)(A)(i) or (ii) may be reconsidered only if at least a majority of the members vote for reconsideration.

(D) *Number of votes required for determinations.*

(i) *With a view toward increasing.* Members may reconsider a determination with a view toward increasing the severity of the determination only if at least a

majority votes for reconsideration. However, members may not reconsider a non-unanimous vote for a determination of death.

(ii) *With a view toward decreasing.* Members may reconsider a determination with a view toward decreasing the severity of the determination only if—

(I) In the case of a death determination, at least one member votes to reconsider; or

(II) In the case of a determination of life in prison without eligibility for parole, more than one-fourth of the members vote to reconsider.

(E) *Successful vote.* If a vote to reconsider succeeds, the members will revote in accordance with R.C.M. 1001(g)(3) and (4).

(j) *Sentencing by military judge.*

(1) The military judge shall sentence the accused in accordance with the binding determination of the members under R.C.M. 1004(g). The military judge may include in any sentence to death or life in prison without eligibility for parole any other authorized lesser punishment. When the military judge's sentence includes confinement or fines, the military judge shall determine an appropriate term of confinement and fine for each specification for which the accused was found guilty.

(2) Where there is a finding of guilty for a specification for which death may be adjudged and a finding of guilty for a specification for which death may not be adjudged—

(A) The members shall make a determination for each specification for which death may be adjudged in accordance with subsection (g);

(B) The military judge shall determine the sentence for any specification returned by the members for sentencing of a lesser punishment than death or life in prison without eligibility for parole; and

(C) The military judge shall determine the sentence for all charges and specifications for which death may not be adjudged. If the sentence includes more than one term of confinement, the military judge shall determine whether the terms of confinement will run concurrently or consecutively.

(k) *Other penalties.* When death is an authorized punishment for an offense, all other punishments authorized under R.C.M. 1003 are also authorized for that offense, including confinement for life, with or without eligibility for parole, and may be adjudged in lieu of death, subject to limitations specifically prescribed in this Manual. A sentence of death includes a dishonorable discharge or dismissal as appropriate. Confinement is a necessary incident of a sentence of death, but not a part of it.

(l) *Impeachment of determination.* A determination that is proper on its face may be impeached only when extraneous prejudicial information was improperly brought to the attention of any member, outside influence was improperly brought to bear upon any member, or unlawful command influence was brought to bear upon any member.”

(r) R.C.M. 1005 is amended to read as follows:

“Rule 1005. Reconsideration of sentence in noncapital cases

(a) *Reconsideration.* Subject to this rule, a sentence may be reconsidered at any time before such sentence is announced in open session of the court.

(b) *Exceptions.*

(1) If the sentence announced in open session was less than the mandatory minimum prescribed for an offense of which the accused has been found guilty, the court that announced the sentence may reconsider such sentence.

(2) If the sentence announced in open session exceeds the maximum permissible punishment for the offense or the jurisdictional limitation of the court-martial, the court that announced the sentence may reconsider such sentence.

(3) If the sentence announced in open session is not in accordance with a sentence limitation in the plea agreement, if any, the court that announced the sentence may reconsider such sentence.

(c) *Clarification of sentence.* A sentence may be clarified at any time before entry of judgment. When a sentence determined by the military judge is ambiguous, the military judge shall call a session for clarification as soon as practicable after the ambiguity is discovered.

(d) *Action by the convening authority or special trial counsel.*

(1) Prior to entry of judgment, if a convening authority becomes aware that the sentence of the court-martial is ambiguous, the convening authority shall return the matter to the court-martial for clarification. When the sentence of the court-martial appears to be illegal, the convening authority shall return the matter to the court-martial for correction.

(2) Prior to entry of judgment in a case in which a special trial counsel has exercised authority—

(A) if the special trial counsel becomes aware that the sentence of a court-martial is ambiguous, the special trial counsel shall make a binding determination that the convening authority return the matter to the court-martial for clarification.

(B) if the sentence of the court-martial appears to be illegal, the special trial counsel shall make a binding determination that the convening authority shall return the matter to the court-martial for correction.

(e) *Limitation.* A military judge may reconsider a sentence once announced only under the circumstances described in R.C.M. 1005(b)."

(s) R.C.M. 1006 is amended to read as follows.

"Rule 1006. [Reserved]".

(t) R.C.M. 1007(b)(1) is amended to read as follows:

"(1) In a capital case, the determination of the members shall be announced by the military judge. If the members voted unanimously for death, the military judge shall announce which aggravating factor or factors under R.C.M. 1004(c) the members unanimously found to exist beyond a reasonable doubt."

(u) R.C.M. 1008 is amended to read as follows:

"Rule 1008. Impeachment of sentence in noncapital cases

A sentence that is proper on its face may be impeached only when extraneous prejudicial information was improperly brought to the attention of the military judge, outside influence was improperly brought to bear upon the military judge, or unlawful command influence was brought to bear upon the military judge."

(v) R.C.M. 1009 is amended to read as follows:

"Rule 1009. [Reserved]".

(w) R.C.M. 1112(b) is amended to read as follows:

(b) *Contents of the record of trial.* The record of trial contains the court-martial proceedings and includes any evidence or exhibits considered by the court-martial in determining the findings or sentence. The record of trial in every general and special court-martial shall include:

- (1) A substantially verbatim recording of the court-martial proceedings except sessions closed for deliberations and voting;
- (2) The original charge sheet or a duplicate;
- (3) A copy of the convening order and any amending order;
- (4) The request, if any, for trial by military judge alone; the accused's election, if any, of members under R.C.M. 903; and, when applicable, any statement by the convening authority required under R.C.M. 503(a)(2);
- (5) Exhibits, or, if permitted by the military judge, copies, photographs, or descriptions of any exhibits that were received in evidence and any appellate exhibits;
- (6) The Statement of Trial Results;
- (7) Any action by the convening authority under R.C.M. 1109 or 1110; and
- (8) The judgment entered into the record by the military judge."

(x) R.C.M. 1117 is amended to read as follows:

“Rule 1117. Appeal of sentence by the United States

(a) *In general.* With the approval of the Judge Advocate General concerned, the Government may appeal a sentence announced under R.C.M. 1007 to the Court of Criminal Appeals on the grounds that—

- (1) The sentence violates the law;
- (2) The sentence is a result of an incorrect application of sentencing parameters or criteria established under Article 56(c); or

(3) The sentence is plainly unreasonable.

(b) *Timing.*

(1) An appeal under this rule must be filed within 60 days after the date on which the judgment of the court-martial is entered into the record under R.C.M. 1111.

(2) Any request for approval must be submitted in sufficient time to obtain and consider submissions under R.C.M. 1117(c)(5).

(c) *Approval process.*

(1) A request from the Government to the Judge Advocate General for approval of an appeal under this rule shall include a statement of reasons in support of an appeal under R.C.M. 1117(a)(1), (a)(2), or (a)(3), as applicable, based upon the information contained in the record before the sentencing authority at the time the sentence was announced under R.C.M. 1007.

(2) A statement of reasons in support of an appeal under R.C.M. 1117(a)(1) shall identify the specific provisions of law at issue and the facts in the record demonstrating a violation of the law in the announced sentence under R.C.M. 1007.

(3) A statement of reasons in support of an appeal under R.C.M. 1117(a)(2) shall identify parameters or criteria at issue and the facts supporting how parameters or criteria were applied incorrectly.

(4) A statement of reasons in support of an appeal under R.C.M. 1117(a)(3) shall identify the facts in the record that demonstrate by clear and convincing evidence that the sentence announced under R.C.M. 1007 was plainly unreasonable.

(5) Prior to acting on a request from the Government, the Judge Advocate General shall transmit the request to the military judge who presided over the presentencing proceeding for purposes of providing the military judge, the parties, and any person who, at the time of

sentencing, was a crime victim as defined by R.C.M. 1001(c)(2)(A), with an opportunity to make a submission addressing the statement of reasons in the Government's request.

(A) The military judge shall establish the time for the parties and crime victims to provide such a submission to the military judge and for the military judge to forward all submissions to the Judge Advocate General. The military judge shall ensure that the parties have not less than 7 days to prepare, review, and transmit such submissions.

(B) Submissions under this paragraph (R.C.M. 1117(c)(5)) shall not include facts beyond the record established at the time the sentence was announced under R.C.M. 1007.

(6) The decision of the Judge Advocate General as to whether to approve a request shall be based on the information developed under this rule.

(7) If an appeal is approved by the Judge Advocate General and submitted to the Court of Criminal Appeals under this rule, the following shall be included with the appeal: the statement of approval, the Government's request and statement of reasons under R.C.M. 1117(c), and any submissions under R.C.M. 1117(c)(5).

(d) *Contents of the record of trial.* Unless the record has been forwarded to the Court of Criminal Appeals for review under R.C.M. 1116(b), the record of trial for an appeal under this rule shall consist of—

- (1) Any portion of the record in the case that is designated as pertinent by either of the parties;
- (2) The information submitted during the presentencing proceeding; and
- (3) Any information required by rule or order of the Court of Criminal Appeals."

Section 2. A new Appendix 12B is inserted immediately after Appendix 12A to read as follows:

“Appendix 12B

Offense Category	Months
1	0–12
2	1–36
3	30–120
4	120–240
5	240–480
6	Confinement for life with eligibility for parole

Sentencing Parameter Table – Confinement Range Categories

Note: For all above categories, if the confinement portion of the maximum authorized punishment for the offense is less than the Offense Category’s confinement maximum, the lesser confinement portion of the maximum authorized punishment shall control as the recommended maximum confinement time for that offense. At a special court-martial, for an offense that is a category 3 offense or greater, the jurisdictional maximum period of confinement (12 months) constitutes the parameter; however, the military judge may impose a period of confinement less than the jurisdictional maximum period of confinement upon finding specific facts that warrant such a sentence.”

Section 3. A new Appendix 12C is inserted immediately after the new Appendix 12B to read as follows:

“Appendix 12C – Offense Category Chart

<i>Article</i>	<i>Offense</i>	<i>Offense Category</i>
77	Principals	Dependent on underlying offense
78	Accessory after the fact	Dependent on underlying offense
79	Conviction of offense charged, lesser included offenses, and attempts	Dependent on underlying offense
80	Attempts	Dependent on underlying offense
81	Conspiracy	Dependent on underlying offense
82	Soliciting commission of offenses Solicitation of espionage	Category 4
	Solicitation of desertion, mutiny or sedition, misbehavior before the enemy if committed or attempted	Dependent on underlying offense
	Solicitation of desertion in time of war if not committed or attempted	Criteria
	Solicitation of desertion if not committed or attempted	Category 1
	Solicitation of mutiny or sedition if not committed or attempted	Category 3
	Solicitation of misbehavior before enemy if not committed or attempted	Category 3
	Solicitation of other offense regardless of whether committed or attempted	Dependent on underlying offense
83	Malingering Feigning illness, physical disablement, mental lapse, or mental derangement In time of war or in a hostile fire pay zone	Criteria
	Other	Category 1
	Intentional self-inflicted injury In time of war or in a hostile fire pay zone	Criteria
	Other	Category 2
84	Breach of medical quarantine Breach of medical quarantine involving a quarantinable communicable disease defined by 42 CFR 70.1	Category 1
	Breach of medical quarantine	Category 1
85	Desertion In time of war	Criteria
	Intent to avoid hazardous duty or to shirk important services	Category 2
	Other cases Terminated by apprehension	Category 2
	Terminated otherwise	Category 1
86	Absence without leave Failing to go, going from appointed place of duty	Category 1
	Absence from unit, organization, etc. Not more than 3 days	Category 1
	More than 3, not more than 30 days	Category 1
	More than 30 days	Category 1
	More than 30 days and terminated by apprehension	Category 1
	Absence from guard or watch	Category 1
	Absence from guard or watch with intent to abandon	Category 1
	Absence with intent to avoid maneuvers or field exercises	Category 1
87	Missing movement; jumping from vessel Missing movement Design	Category 2
	Neglect	Category 1
	Jumping from vessel into the water	Category 1
87a	Resistance, flight, breach of arrest, and escape Resisting apprehension	Category 1
	Flight from apprehension	Category 1
	Breaking arrest	Category 1
	Escape from custody, pretrial confinement, or confinement pursuant to Article 15	Category 1
	Escape from post-trial confinement	Category 2
87b	Offenses against correctional custody and restriction Escape from correctional custody	Category 1
	Breach of correctional custody	Category 1
	Breach of restriction	Category 1

Article	Offense	Offense Category
88	Contempt toward officials	Category 1
89	Disrespect toward superior commissioned officer; assault of superior commissioned officer	
	Disrespect toward superior commissioned officer	
	In command	Category 1
	In rank	Category 1
	Striking, drawing, or lifting up a weapon or offering any violence to superior commissioned officer in execution of office	
	In time or war	Criteria
	Other	Category 2
90	Willfully disobeying superior commissioned officer	
	In time of war	Criteria
	Other	Category 2
91	Insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer	
	Striking or assaulting	
	Warrant officer	Category 2
	Superior noncommissioned or petty officer	Category 2
	Other noncommissioned or petty officer	Category 1
	Willfully disobeying	
	Warrant officer	Category 1
	Noncommissioned or petty officer	Category 1
	Contempt or disrespect	
	Warrant officer	Category 1
	Superior noncommissioned or petty officer	Category 1
	Other noncommissioned or petty officer	Category 1
92	Failure to obey order or regulation	
	Violation of or failure to obey general order or regulation	Category 1
	Violation of or failure to obey other lawful order	Category 1
	Dereliction in performance of duties	
	Through neglect or culpable inefficiency	Category 1
	Through neglect or culpable inefficiency resulting in death or grievous bodily harm	Category 2
	Willful	Category 1
	Willful dereliction of duty resulting in death or grievous bodily harm	Category 2
93	Cruelty and maltreatment	Category 1
93a	Prohibited activities with military recruit or trainee by person in position of special trust	Category 2
94	Mutiny or sedition	Criteria
95	Offenses by sentinel or lookout	
	Drunk or sleeping on post, or leaving post before being relieved	
	In time of war	Criteria
	While receiving special pay under 37 USC 310	Criteria
	In all other places	Category 1
	Loitering or wrongfully sitting on post by a sentinel or lookout	
	In time of war or while receiving special pay under 37 USC 310	Criteria
	Other cases	Category 1
95a	Disrespect toward sentinel or lookout	Category 1
96	Release of prisoner without authority; drinking with prisoner	
	Releasing a prisoner without authority	Category 2
	Allowing a prisoner to escape through neglect	Category 1
	Allowing a prisoner to escape through design	Category 2
	Drinking with prisoner	Category 1
97	Unlawful Detention	Category 2
98	Misconduct as prisoner	Criteria
99	Misbehavior before the enemy	Criteria
100	Subordinate compelling surrender	Criteria
101	Improper use of countersign	Criteria
102	Forcing a safeguard	Criteria
103	Spies	Category 5
103a	Espionage	
	Espionage as a capital offense	Category 5
	Espionage or attempted espionage	Category 5

<i>Article</i>	<i>Offense</i>	<i>Offense Category</i>
103b	Aiding the enemy	Criteria
104	Public records offenses	Category 2
104a	Fraudulent enlistment, appointment, or separation Fraudulent enlistment or appointment	Category 2
	Fraudulent separation	Category 2
104b	Unlawful enlistment, appointment, or separation	Category 2
105	Forgery	Category 2
105a	False or unauthorized pass offenses Possessing or using with intent to defend or deceive, or making, altering, counterfeiting, tampering with, or selling	Category 2
	All other cases	Category 1
106	Impersonation of officer, noncommissioned or petty officer, or agent or official With intent to defraud	Category 2
	All other cases	Category 1
106a	Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button Wrongful wearing of the Medal of Honor; Distinguished Service Cross; Navy Cross; Air Force Cross; Silver Star; Purple Heart; or a valor device on any personal award	Category 1
	All other cases	Category 1
107	False official statements; false swearing False official statement	Category 2
	False swearing	Category 1
107a	Parole violation	Category 1
108	Military property of United States—Loss, damage, destruction, or wrongful disposition Selling or otherwise disposing Of a value of \$1,000 or less	Category 1
	Of a value of more than \$1,000 or any firearm or explosive	Category 2
	Damaging, destroying, losing or suffering to be lost, damaged, destroyed, sold, or wrongfully disposed Through neglect, of a value or damage of Of a value of \$1,000 or less	Category 1
	Of a value of more than \$1,000	Category 1
	Willfully, of a value or damage of \$1,000 or less	Category 1
	More than \$1,000 or of any firearm or explosive	Category 2
108a	Captured or abandoned property Captured, abandoned property; failure to secure, etc. Of a value of \$1,000 or less	Category 1
	Of a value of more than \$1,000 or any firearm or explosive	Category 2
	Looting or pillaging	Criteria
109	Property other than military property of United States— Waste, spoilage, or destruction Wasting, spoiling, destroying, or damaging non-military property Of a value of \$1,000 or less	Category 1
	Of a value of more than \$1,000	Category 2
109a	Mail matter: wrongful taking, opening, etc.....	Category 2
110	Improper hazarding of vessel or aircraft Willfully and wrongfully	Criteria
	Negligently	Category 2
111	Leaving scene of vehicle accident	Category 1
112	Drunkenness and other incapacitation offenses Drunk on duty	Category 1
	Incapacitation for duty from drunkenness or drug use	Category 1
	Drunk prisoner	Category 1

<i>Article</i>	<i>Offense</i>	<i>Offense Category</i>
112a	Wrongful use, possession, etc., of controlled substances	
	Wrongful use, possession, manufacture, or introduction of controlled substance	
	Wrongful use or possession of amphetamine, cocaine, heroin, lysergic acid diethylamide, marijuana, methamphetamine, opium, phencyclidine, secobarbital, and Schedule I, II, and III controlled substances	Category 1
	Wrongful manufacture or introduction of amphetamine, cocaine, heroin, lysergic acid diethylamide, marijuana, methamphetamine, opium, phencyclidine, secobarbital, and Schedule I, II, and III controlled substances	Category 2
	Wrongful use, possession, manufacture, or introduction of phenobarbital and Schedule IV and V controlled substances	Category 1
113	Wrongful distribution, possession, manufacture, or introduction of controlled substance with intent to distribute, or wrongful importation or exportation of a controlled substance	
	Amphetamine, cocaine, heroin, lysergic acid diethylamide, marijuana, methamphetamine, opium, phencyclidine, secobarbital, and Schedule I, II, and III controlled substances	Category 2
	Phenobarbital and schedule IV and V controlled substances	Category 2
114	Drunken or reckless operation of a vehicle, aircraft, or vessel	
	Resulting in personal injury	Category 2
	No personal injury involved	Category 1
115	Endangerment offenses	
	Carrying concealed weapon	Category 1
	Discharging firearm, willfully, under such circumstances as to endanger human life	Category 1
	Reckless endangerment	Category 1
	Dueling	Category 1
116	Communicating threats	
	Threats and false threats generally	Category 2
	Threats and false threats concerning use of explosives, etc.	Category 3
117	Riot or breach of peace	
	Riot	Category 3
	Breach of the peace	Category 1
118	Provoking speeches or gestures	Category 1
119	Wrongful broadcast or distribution of intimate visual images	Category 2
118	Murder	
	Article 118(1) or (4)	Category 6
	Article 118(2) or (3)	Category 5
119	Manslaughter	
	Voluntary manslaughter	Category 4
	Involuntary manslaughter	Category 3
	Voluntary manslaughter of a child under 16 years of age	Category 4
	Involuntary manslaughter of a child under 16 years of age	Category 3
119a	Death or injury of an unborn child	
	Injuring or killing an unborn child	Dependent on underlying offense
	Attempting to kill an unborn child	Dependent on underlying offense
	Intentionally killing an unborn child	Dependent on underlying offense
119b	Child endangerment	
	Endangerment by design resulting in grievous bodily harm	Category 3
	Endangerment by design resulting in harm	Category 2
	Other cases by design	Category 2
	Endangerment by culpable negligence resulting in grievous bodily harm	Category 2
	Endangerment by culpable negligence resulting in harm	Category 2
	Other cases by culpable negligence	Category 1

<i>Article</i>	<i>Offense</i>	<i>Offense Category</i>
120	Rape and sexual assault generally	
	Rape	Category 4
	Sexual assault	Category 3
	Aggravated sexual contact	Category 3
	Abusive sexual contact	Category 2
120a	Mails: deposit of obscene matter	Category 2
120b	Rape and sexual assault of a child	
	Rape of a child	Category 5
	Sexual assault of a child	Category 4
	Sexual abuse of a child	
	Cases involving sexual contact	Category 3
	Other cases	Category 3
120c	Other sexual misconduct	
	Indecent viewing	Category 1
	Indecent recording	Category 2
	Broadcasting or distributing of an indecent recording	Category 2
	Forcible pandering	Category 3
	Indecent exposure	Category 1
121	Larceny and wrongful appropriation	
	Larceny	
	Property of a value of \$1,000 or less	Category 1
	Military property of a value of more than \$1,000 or of any military motor vehicle, aircraft, vessel, firearm, or explosive	Category 2
	Property other than military property of a value of more than \$1,000 or any motor vehicle, aircraft, vessel, firearm, or explosive	Category 2
	Wrongful appropriation	
	Of a value of \$1,000 or less	Category 1
	Of a value of more than \$1,000	Category 1
	Of any motor vehicle, aircraft, vessel, firearm, explosive, or military property of a value of more than \$1,000	Category 1
121a	Fraudulent use of credit cards, debit cards, and other access devices	
	Fraudulent use of a credit card, debit card, or other access device to obtain property of a value of \$1,000 or less	Category 1
	Fraudulent use during any 1-year period of a credit card, debit card, or other access device to obtain property the aggregate value of which is more than \$1,000	Category 2
121b	False pretenses to obtain services	
	Of a value of \$1,000 or less	Category 1
	Of a value of more than \$1,000	Category 2
122	Robbery	
	When committed with a dangerous weapon	Category 3
	All other cases	Category 3
122a	Receiving stolen property	
	Receiving, buying, or concealing stolen property of a value of \$1,000 or less	Category 1
	Receiving, buying, or concealing stolen property of a value of more than \$1,000	Category 2
123	Offenses concerning Government computers	
	Unauthorized distribution of classified information obtained from a Government computer	Category 3
	Unauthorized access of a Government computer and obtaining classified or other protected information	Category 2
	Causing damage to a Government computer	Category 3
123a	Making, drawing, or uttering check, draft, or order without sufficient funds	
	For the procurement of any article or thing of value, with intent to defraud, in the face amount of:	
	\$1,000 or less	Category 1
	More than \$1,000	Category 2
	For the payment of any past due obligation, or for any other purpose, with intent to deceive	Category 1

<i>Article</i>	<i>Offense</i>	<i>Offense Category</i>
124	Frauds against the United States	
	Article 124(1) and (2)	Category 2
	Article 124(3) and (4)	
	When amount is \$1,000 or less	Category 1
	When amount is more than \$1,000	Category 2
124a	Bribery	Category 2
124b	Graft	Category 2
125	Kidnapping	Category 3
126	Arson; burning property with intent to defraud	
	Aggravated arson	Category 3
	Simple arson, where property value is:	
	\$1,000 or less	Category 1
	More than \$1,000	Category 2
	Burning with intent to defraud	Category 2
127	Extortion	Category 2
128	Assault	
	Simple assault	
	Generally	Category 1
	When committed with an unloaded firearm	Category 2
	Battery	
	Assault consummated by a battery	Category 1
	Assault upon a commissioned officer of the armed forces of the United States or of a friendly foreign power, not in the execution of office	Category 2
	Assault upon a warrant officer, not in the execution of office	Category 2
	Assault upon a noncommissioned or petty officer, not in the execution of office	Category 1
	Assault upon a sentinel or lookout in the execution of duty, or upon any person who, in the execution of office, is performing security police, military police, shore patrol, master at arms, or other military or civilian law enforcement duties	Category 2
	Assault consummated by a battery upon a child under 16 years	Category 2
	Assault with intent to commit murder or rape	Category 3
	Assault with intent to commit voluntary manslaughter, robbery, arson, burglary, or kidnapping	Category 3
	Aggravated assault	
	Aggravated assault with a dangerous weapon	
	When committed with a loaded firearm	Category 3
	When committed upon a child under the age of 16 years	Category 3
	Other cases	Category 2
	Aggravated assault in which substantial bodily harm is inflicted	
	When the injury is inflicted with a loaded firearm	Category 3
	When the injury is inflicted upon a child under the age of 16 years	Category 3
	Other cases	Category 2
	Aggravated assault in which grievous bodily harm is inflicted	
	When the injury is inflicted with a loaded firearm	Category 3
	When the injury is inflicted upon a child under the age of 16 years	Category 3
	Other cases	Category 2
	Aggravated assault by strangulation or suffocation	
	When committed upon a child under the age of 16 years	Category 3
	Other cases	Category 2
128a	Maiming	Category 3
128b	Domestic Violence	
	Commission of violent offense against spouse, intimate partner, or immediate family member of that person	Dependent on underlying offense
	Commission of UCMJ violation against any person with intent to threaten or intimidate spouse, intimate partner, or immediate family member of that person	Dependent on underlying offense

<i>Article</i>	<i>Offense</i>	<i>Offense Category</i>
	Commission of UCMJ violation against any property, including animal, with intent to threaten or intimidate spouse, intimate partner, or immediate family member of that person	Dependent on underlying offense
	Violation of protection order with intent to threaten or intimidate spouse, intimate partner, or immediate family member of that person	Category 2
	Violation of protection order with intent to commit a violent offense against spouse, intimate partner, or immediate family member of that person	Category 2
	Assaulting spouse, intimate partner, or immediate family member of that person by strangulation or suffocation	
	Aggravated assault by strangulation or suffocation when committed upon a child under 16 years	Category 3
	Other cases	Category 2
129	Burglary; unlawful entry	
	Burglary (with intent to commit an offense punishable under Article 118–120, 120b–121, 122, 125–128a, or 130)	Category 3
	Burglary (with intent to commit any other offense punishable under the UCMJ)	Category 2
	Unlawful entry	Category 1
130	Stalking	Category 2
131	Perjury	Category 2
131a	Subornation of perjury	Category 2
131b	Obstructing justice	Category 2
131c	Misprision of serious offense	Category 2
131d	Wrongful refusal to testify	Category 2
131e	Prevention of authorized seizure of property	Category 1
131f	Noncompliance with procedural rules	
	Unnecessary delay in disposing of case	Category 1
	Knowingly and intentionally failing to enforce or comply with provisions of the UCMJ	Category 2
131g	Wrongful interference with adverse administrative proceeding	Category 2
132	Retaliation	Category 2
133	Conduct unbecoming an officer	Criteria
134	General article	Criteria
	Animal abuse	
	Abuse, neglect, or abandonment of an animal	Category 1
	Abuse, neglect, or abandonment of a public animal	Category 1
	Sexual act with an animal or cases where the accused caused the serious injury or death of the animal	Category 2
	Bigamy	Category 1
	Check, worthless making and uttering – by dishonorably failing to maintain funds	Category 1
	Child pornography	
	Possessing, receiving, or viewing child pornography	Category 2
	Possessing child pornography with intent to distribute	Category 3
	Distributing child pornography	Category 3
	Producing child pornography	Category 4
	Debt, dishonorably failing to pay	Category 1
	Disloyal statements	Category 1
	Disorderly conduct, drunkenness	
	Disorderly conduct	
	Under such circumstances as to bring discredit upon the military Service	Category 1
	Other cases	Category 1
	Drunkenness	
	Aboard ship or under such circumstances as to bring discredit upon the military Service	Category 1
	Other cases	Category 1

<i>Article</i>	<i>Offense</i>	<i>Offense Category</i>
134	Drunk and disorderly	
	Aboard ship	Category 1
	Under such circumstances as to bring discredit upon the military	
	Service	Category 1
	Other cases	Category 1
	Extramarital sexual conduct	Category 1
	Firearm, discharging – through negligence	Category 1
	Fraternization	Category 1
	Gambling with subordinate	Category 1
	Homicide, negligent	Category 2
	Indecent conduct	Category 2
	Indecent language	
	Communicated to any child under the age of 16 years	Category 2
	Other cases	Category 1
	Pandering and prostitution	
	Prostitution and patronizing a prostitute	Category 1
	Pandering	Category 2
	Self-injury without intent to avoid service	
	In time of war or in a hostile fire pay zone	Criteria
	Intentional self-inflicted injury	Category 1
	Sexual harassment	Category 2
	Straggling	Category 1”

Section 4. A new Appendix 12D is inserted immediately after Appendix 12C to read as follows:

“Appendix 12D - List of Sentencing Criteria Offenses

UCMJ Article	Title
82	Solicitation to desert (in time of war)
83	Malingering (in time of war or in hostile fire pay zone)
85	Desertion (in time of war)
89	Striking, drawing, or lifting up a weapon or offering any violence to superior commissioned officer in execution of office (in time of war)
90	Willfully disobeying a lawful order of superior commissioned officer (in time of war)
94	Mutiny or sedition
95	Offenses by sentinel or lookout (in time of war or while receiving special pay under 37 U.S.C. 310)
98	Misconduct as prisoner
99	Misbehavior before the enemy
100	Subordinate compelling surrender
101	Improper use of countersign
102	Forcing a safeguard
103b	Aiding the enemy
108a	Captured or abandoned property (looting or pillaging) Improper hazarding of vessel or aircraft (willfully and wrongfully)
110	
133	Conduct unbecoming an officer
134	General article
134	Self-injury without intent to avoid service (in time of war or in a hostile fire pay zone)

SENTENCING CRITERIA

The military judge shall consider the sentencing criteria established for the following offenses:

Article 82. Solicitation to desert (*in time of war*).

The age and experience of the accused;

Any mental impairment or deficiency of the accused;

Whether the offense disrupted or, in any way, impacted the operations of any organization;

Whether the offense caused damage to the national security of the United States, regardless of whether the accused intended such damage;

Whether the offense was committed in a way or under circumstances that unlawfully and substantially endangered the life of one or more persons; and

Whether the offense was committed in territory in which the United States or an ally of the United States was then an occupying power or in which the United States Armed Forces were then engaged in a contingency operation or active hostilities.

Article 83. Malingering (*in time of war or in hostile fire pay zone*).

The age and experience of the accused;

Any mental impairment or deficiency of the accused;

Whether the offense was committed before or in the presence of the enemy;

Whether the offense disrupted or, in any way, impacted the operations of any organization;

Whether the offense caused damage to the national security of the United States, regardless of whether the accused intended such damage;

Whether the offense was committed in a way or under circumstances that unlawfully and substantially endangered the life of one or more persons;

Whether the offense was committed to avoid the movement of a vessel or hazardous duty or shirk important service; and

Whether the offense was committed in territory in which the United States or an ally of the United States was then an occupying power or in which the United States Armed Forces were then engaged in a contingency operation or active hostilities.

Article 85. Desertion (*in time of war*).

The age and experience of the accused;

Any mental impairment or deficiency of the accused;

Whether the offense was committed before or in the presence of the enemy;

Whether the offense was committed while the accused was under charges, investigation, or adverse action;

Whether the offense caused damage to the national security of the United States, regardless of whether the accused intended such damage;

Whether the offense disrupted or, in any way, impacted the operations of any organization;

Whether the offense was committed to avoid the movement of a vessel or hazardous duty or shirk important service;

Whether the offense was committed in a way or under circumstances that unlawfully and substantially endangered the life of one or more persons; and

Whether the offense was committed in a way or under circumstances such that the location from which the accused absented himself or remained absent was a territory in which

the United States or an ally of the United States was then an occupying power or in which the United States Armed Forces were then engaged in a contingency operation or active hostilities.

Article 89. Striking, drawing, or lifting up a weapon or offering any violence to superior commissioned officer in execution of office (*in time of war*).

The age and experience of the accused;

Any mental impairment or deficiency of the accused;

Whether the offense disrupted or, in any way, impacted the operations of any organization;

Whether the offense was committed to avoid the movement of a vessel or hazardous duty or shirk important service;

Whether the offense was committed before or in the presence of the enemy;

Whether the offense was committed before or in the presence of other members of the accused's or the superior commissioned officer's unit;

Whether the offense caused damage to the national security of the United States, regardless of whether the accused intended such damage;

The status of the superior commissioned officer and command relationship to the accused;

Whether the accused abused a position of trust or authority, or used specialized skill or training, in a manner that significantly facilitated the offense;

The amount of force or violence used or threatened by the accused and other participants in the offense;

The nature or extent of any injuries suffered by the victim;

Whether the offense was committed in a way that created, or under circumstances creating, a substantial risk of bodily harm or death to any person;

Whether the offense involved the conscious or reckless disregard of a risk of death or serious bodily harm to any person;

Whether the offense involved possession of a dangerous weapon; and

Whether the offense was committed in territory in which the United States or an ally of the United States was then an occupying power or in which the United States Armed Forces were then engaged in a contingency operation or active hostilities.

Article 90. Willfully disobeying a lawful order of superior commissioned officer (*in time of war*).

The age and experience of the accused;

Any mental impairment or deficiency of the accused;

Whether the offense disrupted or, in any way, impacted the operations of any organization;

Whether the offense was committed to avoid the movement of a vessel or hazardous duty or shirk important service;

Whether the offense was committed before or in the presence of the enemy;

Whether the offense was committed before or in the presence of other members of the accused's or the superior commissioned officer's unit;

Whether the offense caused damage to the national security of the United States, regardless of whether the accused intended such damage;

The status of the superior commissioned officer and command relationship to the accused;

Whether the accused abused a position of trust or authority, or used specialized skill or training, in a manner that significantly facilitated the offense;

Whether the offense was committed in a way that created, or under circumstances creating, a substantial risk of bodily harm or death to any person;

Whether the offense involved the conscious or reckless disregard of a risk of death or serious bodily harm to any person;

Whether the offense involved possession of a dangerous weapon; and

Whether the offense was committed in territory in which the United States or an ally of the United States was then an occupying power or in which the United States Armed Forces were then engaged in a contingency operation or active hostilities.

Article 94. Mutiny or sedition.

The age and experience of the accused;

Any mental impairment or deficiency of the accused;

The accused's relationship to the military or civil authority against which the accused committed the mutiny or sedition;

Whether the offense disrupted or, in any way, impacted the operations of any organization;

Whether the offense was committed to avoid the movement of a vessel or hazardous duty or shirk important service;

Whether the offense was committed before or in the presence of the enemy;

Whether the offense caused damage to the national security of the United States, regardless of whether the accused intended such damage;

Whether the accused was the actual perpetrator of the offense or was a principal whose participation in the offense was major;

Whether the accused was an organizer, leader, manager, or supervisor in the offense and the number of other participants in the offense;

Whether the accused was a minimal or minor participant in the offense;

Whether the accused abused a position of trust or authority, or used specialized skill or training, in a manner that significantly facilitated the offense;

The amount of force or violence used or threatened by the accused and other participants in the offense;

The nature or extent of any injuries suffered by any victims of the offense;

The nature or extent of any public or private property damage related to the offense;

Whether the offense was committed in a way or under circumstances that unlawfully and substantially endangered the life of one or more persons;

Whether the offense involved the conscious or reckless disregard of a risk of death or serious bodily harm to any person;

Whether the offense involved possession of a dangerous weapon;

Whether the offense involved the conscious or reckless disregard of a risk of serious damage to public or private property; and

Whether the offense was committed in territory in which the United States or an ally of the United States was then an occupying power or in which the United States Armed Forces were then engaged in a contingency operation or active hostilities.

Article 95. Offenses by sentinel or lookout (*in time of war or while the accused was receiving special pay under 37 U.S.C. 310*).

The age and experience of the accused;

Any mental impairment or deficiency of the accused;

Whether the offense disrupted or, in any way, impacted the operations of any organization;

Whether the offense was committed to avoid the movement of a vessel or hazardous duty or shirk important service;

Whether the offense was committed before or in the presence of the enemy;

Whether the offense caused damage to the national security of the United States, regardless of whether the accused intended such damage;

Whether the offense was committed in a way or under circumstances that unlawfully and substantially endangered the life of one or more persons; and

Whether the offense was committed in territory in which the United States or an ally of the United States was then an occupying power or in which the United States Armed Forces were then engaged in a contingency operation or active hostilities.

Article 98. Misconduct as prisoner.

The age and experience of the accused;

Any mental impairment or deficiency of the accused;

Whether the offense caused damage to the national security of the United States, regardless of whether the accused intended such damage;

Whether the accused was the actual perpetrator of the offense or was a principal whose participation in the offense was major;

Whether the accused was an organizer, leader, manager, or supervisor in the offense and the number of other participants in the offense;

Whether the accused was a minimal or minor participant in the offense;

Whether the accused abused a position of trust or authority, or used specialized skill or training, in a manner that significantly facilitated the offense;

The nature of any maltreatment inflicted on other prisoners;

The amount of force or violence used or threatened by the accused and other participants in the offense;

The nature or extent of any injuries suffered by any victims of the offense;

Whether the offense was committed in a way or under circumstances that unlawfully and substantially endangered the life of one or more persons;

Whether the offense involved the conscious or reckless disregard of a risk of death or serious bodily harm to any person;

Whether the offense involved possession of a dangerous weapon;

The nature of any benefits or improvements enjoyed by the accused as a result of his or her conduct; and

Whether the offense was committed in territory in which the United States or an ally of the United States was then an occupying power or in which the United States Armed Forces were then engaged in a contingency operation or active hostilities.

Article 99. Misbehavior before the enemy.

The age and experience of the accused;

Any mental impairment or deficiency of the accused;

Whether the offense disrupted or, in any way, impacted the operations of any organization;

Whether the offense caused damage to the national security of the United States, regardless of whether the accused intended such damage;

Whether the accused abused a position of trust or authority, or used specialized skill or training, in a manner that significantly facilitated the offense;

Whether the accused was the actual perpetrator of the offense or was a principal whose participation in the offense was major;

Whether the accused was an organizer, leader, manager, or supervisor in the offense and the number of other participants in the offense;

Whether the accused was a minimal or minor participant in the offense;

Whether the offense was committed in a way or under circumstances that unlawfully and substantially endangered the life of one or more persons;

Whether the offense involved the conscious or reckless disregard of a risk of death or serious bodily harm to any person;

Whether the offense involved possession of a dangerous weapon;

Whether the offense was committed in a way that created, or under circumstances creating, a substantial risk of bodily harm or death to any person; and

Whether the offense was committed in territory in which the United States or an ally of the United States was then an occupying power or in which the United States Armed Forces were then engaged in a contingency operation or active hostilities.

Article 100. Subordinate compelling surrender.

The age and experience of the accused;

Any mental impairment or deficiency of the accused;

The nature of the conflict or hostilities in which the accused's unit was engaged;

Whether the offense was committed in the immediate presence of the enemy;

Whether the offense caused damage to the national security of the United States,

regardless of whether the accused intended such damage;

Whether the offense impacted the operations of any organization in addition to the unit of the accused;

Whether the offense was committed in a way or under circumstances that unlawfully and substantially endangered the life of one or more persons;

Whether the offense was committed in territory in which the United States or an ally of the United States was then an occupying power or in which the United States Armed Forces were then engaged in a contingency operation or active hostilities;

Whether the accused abused a position of trust or authority, or used specialized skill or training, in a manner that significantly facilitated the offense;

Whether the offense was committed for the purpose of receiving money or a thing of value;

Whether the accused was the actual perpetrator of the offense or was a principal whose participation in the offense was major;

Whether the accused was an organizer, leader, manager, or supervisor in the offense and the number of other participants in the offense; and

Whether the accused was a minimal or minor participant in the offense.

Article 101. Improper use of countersign.

The age and experience of the accused;

Any mental impairment or deficiency of the accused;

Whether the offense was committed before or in the presence of the enemy;

Whether the offense caused damage to the national security of the United States, regardless of whether the accused intended such damage;

Whether the offense was committed in a way or under circumstances that unlawfully and substantially endangered the life of one or more persons;

Whether the offense was committed in territory in which the United States or an ally of the United States was then an occupying power or in which the United States Armed Forces were then engaged in a contingency operation or active hostilities;

Whether the accused abused a position of trust or authority, or used specialized skill or training, in a manner that significantly facilitated the offense; and

Whether the offense was committed for the purpose of receiving money or a thing of value.

Article 102. Forcing a safeguard.

The age and experience of the accused;

Any mental impairment or deficiency of the accused;

That nature of the person or persons, place, or property intended to be protected by the safeguard;

Whether the offense was committed before or in the presence of the enemy;

Whether the offense caused damage to the national security of the United States, regardless of whether the accused intended such damage;

Whether the offense was committed in a way or under circumstances that unlawfully and substantially endangered the life of one or more persons;

Whether the offense was committed in territory in which the United States or an ally of the United States was then an occupying power or in which the United States Armed Forces were then engaged in a contingency operation or active hostilities;

Whether the accused abused a position of trust or authority, or used specialized skill or training, in a manner that significantly facilitated the offense;

Whether the offense was committed for the purpose of receiving money or a thing of value;

Whether any person or persons, place, or property intended to be protected by the safeguard was injured or damaged;

Whether the accused was the actual perpetrator of the offense or was a principal whose participation in the offense was major;

Whether the accused actually knew of the safeguard;

Whether the accused was an organizer, leader, manager, or supervisor in the offense and the number of other participants in the offense; and

Whether the accused was a minimal or minor participant in the offense.

Article 103b. Aiding the enemy

The age and experience of the accused;

Any mental impairment or deficiency of the accused;

Whether the accused abused a position of trust or authority, or used specialized skill or training, in a manner that significantly facilitated the offense;

Whether the offense disrupted or, in any way, impacted the operations of any organization;

Whether the accused intended to cause damage to national security;

Whether the offense caused damage to the national security of the United States, regardless of whether the accused intended such damage;

Whether the offense involved the conscious or reckless disregard of a risk of death or serious bodily harm to any person;

Whether the offense involved possession of a dangerous weapon;

Whether the offense was committed in a way or under circumstances that unlawfully and substantially endangered the life of one or more persons; and

Whether the offense was committed in territory in which the United States or an ally of the United States was then an occupying power or in which the United States Armed Forces were then engaged in a contingency operation or active hostilities.

Article 108a. Captured or abandoned property (*looting or pillaging*)

The age and experience of the accused;

Any mental impairment or deficiency of the accused;

Whether the offense was committed before or in the presence of the enemy;

Whether the offense caused damage to the national security of the United States, regardless of whether the accused intended such damage;

Whether the offense was committed in territory in which the United States or an ally of the United States was then an occupying power or in which the United States Armed Forces were then engaged in a contingency operation or active hostilities;

Whether the accused was the actual perpetrator of the offense or was a principal whose participation in the offense was major;

Whether the accused was an organizer, leader, manager, or supervisor in the offense and the number of other participants in the offense;

- Whether the accused was a minimal or minor participant in the offense;
- Whether the accused abused a position of trust or authority, or used specialized skill or training, in a manner that significantly facilitated the offense;
- Whether the offense involved the conscious or reckless disregard of a risk of death or serious bodily harm to any person;
- Whether the offense involved possession of a dangerous weapon;
- Whether the offense was committed in a way or under circumstances that unlawfully and substantially endangered the life of one or more persons;
- Whether the offense involved the conscious or reckless disregard of a risk of serious damage to public or private property;
- The amount of force or violence used or threatened by the accused and other participants in the offense;
- The value and nature of the captured or abandoned property; and
- The amount of restitution, if any, paid by the accused.

Article 110. Improper hazarding of vessel or aircraft (*willfully and wrongfully*).

- The age and experience of the accused;
- Any mental impairment or deficiency of the accused;
- The position, responsibility, and authority of the accused at the time of the offense;
- Whether the offense caused damage to the vessel or aircraft and the amount and type of damage;
- Whether the accused committed the offense with the intent to prevent the vessel's or aircraft's deployment, movement, or departure;
- Whether the offense occurred in a time of active hostilities;

Whether the offense disrupted or, in any way, impacted the operations of any organization;

Whether the offense caused damage to the national security of the United States, regardless of whether the accused intended such damage;

Whether the offense involved the conscious or reckless disregard of a risk of death or serious bodily harm to any person;

Whether the accused abused a position of trust or authority, or used specialized skill or training, in a manner that significantly facilitated the offense;

Whether the accused was an organizer, leader, manager, or supervisor in the offense and the number of other participants in the offense; and

Whether the accused was the actual perpetrator of the offense or was a principal whose participation in the offense was major.

Article 133. Conduct unbecoming an officer.

The age and experience of the accused;

Any mental impairment or deficiency of the accused;

The sentencing parameter for the most analogous enumerated offense;

The grade of the accused;

Whether the offense occurred in a time of active hostilities;

Whether the offense disrupted or, in any way, impacted the operations of any organization;

Whether the offense caused damage to the national security of the United States, regardless of whether the accused intended such damage;

Whether the offense involved a severe lack of integrity and judgment.

Whether the offense involved the conscious or reckless disregard of a risk of death or serious bodily harm to any person; and

Whether the accused abused a position of trust or authority, or used specialized skill or training, in a manner that significantly facilitated the offense.

Article 134. General article.

(A) For offenses under Article 134's "disorders and neglects to the prejudice of good order and discipline" or "conduct of a nature to bring discredit upon the armed forces" clause that are not listed in Part IV of the Manual for Courts-Martial:

(1) For offenses for which the maximum punishment is calculated pursuant to Rule for Courts-Martial 1003(c)(1)(B)(i), the sentencing parameter for the offense that provided the maximum punishment.

(2) For offenses for which the maximum punishment is calculated by reference to a provision of the United States Code pursuant to Rule for Courts-Martial 1003(c)(1)(B)(ii), the Federal Sentencing Guideline range for the offense that provided the maximum punishment.

(3) For offenses for which the maximum punishment is calculated by reference to a custom of the applicable service pursuant to Rule for Courts-Martial 1003(c)(1)(B)(ii), the sentencing parameter for the most analogous enumerated offense.

(B) For offenses under Article 134's "crimes and offenses not capital" clause, the Federal Sentencing Guideline range for the underlying offense.

Article 134. Self-injury without intent to avoid service in a time of war or in a hostile fire pay zone.

The age and experience of the accused;

Any mental impairment or deficiency of the accused;

Whether the offense was committed before or in the presence of the enemy;
Whether the offense disrupted or, in any way, impacted the operations of any organization;

Whether the offense caused damage to the national security of the United States, regardless of whether the accused intended such damage;

Whether the offense was committed in a way or under circumstances that unlawfully and substantially endangered the life of one or more persons; and

Whether the offense was committed in territory in which the United States or an ally of the United States was then an occupying power or in which the United States Armed Forces were then engaged in a contingency operation or active hostilities.”

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